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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1902.

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REUBEN M. MANLEY, EXECUTOR OF THE ESTATE OF GEORGE MANLEY, DECEASED, PLANITIFF IN ERROR,

VS.

ANNA O. PARK, SUBSTITUTED FOR RICHARD A. PARK, DECEASED, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

Brief of Plaintiff in Error, in Opposition of Motion of Defendant in Error to Dismiss or Affirm, and Brief of Plaintiff in Error on the Merits.

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STATEMENT OF THE CASE.

On November 4, 1895, the defendant in error, as plaintiff, brought suit in the District Court of Atchison County, Kansas, against William H. Risk, executor of the estate of George Manley, deceased, and in his petition said plaintiff

alleged the death of George Manley at the County of Union, State of New Jersey, on December 30, 1891, and that at the time of his death he was a resident and citizen of said county and state. That at the time of his decease he was the owner and holder of shares of stock in The Kansas Trust and Banking Company to the extent of $27,500. That he died testate, and by his last will and testament nominated and appointed Reuben M. Manley and William H. Risk, as the executors of and trustees under said last will and testament. That on January 22, 1892, said last will and testament was duly admitted to probate in the Orphans' Court of said Union County, New Jersey, and letters testamentary were duly issued to William H. Risk, one of said executors and trustees, and thereon, and on said day, said William H. Risk duly accepted such trust and qualified as such executor and trustee, and as such executor and trustee became seized and possessed of all the property of said George Manley, deceased, lying and situate in the State of Kansas.

That under and by virtue of said ownership of such shares of stock by said George Manley, and the making of said will and the probate thereof, and the appointment of William H. Risk as executor, said defendant, William H. Risk, executor of said estate of George Manley, deceased, became and is a stockholder of said The Kansas Trust and Banking Company, a corporation organized and incorporated under the laws of the State of Kansas, other than for railroad, religious or charitable purposes, and as such ex-

ecutor of such estate is the owner and holder of shares of stock of said corporation amounting to the sum of $27,500, and that said corporation was wholly insolvent and had no means or property out of or from which said indebtedness so due to the plaintiff, as creditor, could be collected.

That plaintiff was the owner and holder of certain debenture bonds issued by said The Kansas Trust and Banking Company, aggregating the sum of $2,000, and was a creditor of said corporation, and that said corporation had suspended business for more than one year prior to the filing of said petition, and had not since engaged in the transaction of any business whatever. And plaintiff demanded judgment for the amount of said debenture bonds, with the interest due thereon and costs of suit. (Transcript of Record, pp. 5 to 13.)

Summons was issued in said action, directed to the sheriff of Atchison County, Kansas, for service and return, and was on November 8, 1895, returned by him non est. (Transcript of Record, pp. 15 and 16.)

On the affidavit of the plaintiff therefor, and on the single ground that the defendant was a non-resident of the state (Transcript of Record, p. 14), an order of attachment was issued in said cause, and real property of the defendant attached (Transcript of Record, pp. 16 and 17), and thereafter service was had on the defendant by publication. (Transcript of Record, pp. 17 and 18.)

On March 29, 1897, said action was duly revived against R. M. Manley, executor of the estate of George

Manley, deceased, and successor of said William Risk, executor (Transcript of Record, pp. 20 and 21), and plaintiff filed his supplemental petition in said cause setting up such revivor. (Transcript of Record, p. 21.)

On November 8, 1897, said defendant filed his answer in said cause in which he admitted that George Manley died at Union County, New Jersey, on December 30, 1891, being at the time of his death a resident and citizen of Union County, New Jersey, and that at the time of his death said George Manley, deceased, was the owner and holder of shares of stock in The Kansas Trust and Banking Company, amounting to the sum of $27,500; that he died testate, and in his last will and testament designated Reuben M. Manley and William H. Risk as the executors of, and trustees under, the same; that on January 22, 1892, said last will and testament was duly admitted to probate in the Orphans' Court of Union county, New Jersey, and letters testamentary were duly issued to William H. Risk, one of said executors and trustees, and on said day William H. Risk duly accepted said trust and qualified as such executor and trustee, and thereby said William H. Risk, as such executor, became seized and possessed of all of the property of said George Manley, deceased, situate in the State of Kansas; that on July 15, 1896, letters testamentary were duly issued to said Reuben M. Manley, the other of said executors and trustees, by the Orphans' Court of Union county, New Jersey, and on said day said Reuben M. Manley duly accepted said trust, and qualified as such executor

and trustee; that on January 23, 1897, said William H. Risk was by the Orphans' Court of Union county, New Jersey, duly relieved and discharged as such executor and trustee, and thereby said Reuben M. Manley, as such executor, became seized and possessed of all of the property of said George Manley, deceased, situate in the State of Kansas; that the defendant was the owner and holder of shares of stock in the said The Kansas Trust and Banking Company, amounting to the sum of $27,500, and that the plaintiff was a creditor of The Kansas Trust and Banking Company, in the amount, and on account of the debenture bonds, set out in the petition of the plaintiff, and said defendant denied each and every statement, allegation and averment in said petition of the plaintiff, excepting as so admitted. (Transcript of Record, pp. 22 and 23.)

On November 10, 1897, plaintiff filed his reply to said answer, and which said reply was a general denial, and further alleged that said George Manley at the time of his death, and long prior thereto, was not a citizen of the State of Kansas, and was not within said State of Kansas, and that said William H. Risk and Reuben M. Manley were neither of them residents within nor citizens of the State of Kansas, at any time after the appointment of them, respectively, as executors of the estate of George Manley, deceased, nor were they, or either of them, within the said State of Kansas after their respective appointments as executor, but were continuously out of and beyond the said State of Kansas. (Transcript of Record, p. 26.)

On December 13, 1897, said cause was tried to the court without a jury, a jury trial having been waived, and the court rendered judgment in favor of the plaintiff and against the defendant for the sum of $2,463.07, with interest and costs, and ordered the property attached in said action sold to satisfy the same. (Transcript of Record, p. 29.)

On December 15, 1897, said defendant filed his motion for a new trial (Transcript of Record, p. 30), which was by the court on June 7, 1898, overruled. (Transcript of Record, p. 31.)

On December 12, 1899, there was filed in said cause the mandate and judgment of the Supreme Court dismissing the proceeding in error and petition in error of said defendant, as plaintiff in error, to reverse the judgment in said cause. (Transcript of Record, p. 34.)

On May 31, 1900, the said defendant filed in said court and cause his motion to set aside the judgment in said cause, and also the order and judgment of the court ordering the property attached therein to be sold to satisfy said judgment, for the following reasons, to-wit:

First: For that the court had no jurisdiction to entertain said suit, and to render judgment therein, and to order the property attached therein sold to satisfy said judgment.

Second. For that the plaintiff was not a judgment creditor of The Kansas Trust and Banking Company, and said company had not been dissolved by the expiration of the time limited in its charter or by a judgment of dissolution rendered by a court of competent jurisdiction; that the

plaintiff had a special security for the payment of the debenture bonds sued on, and the petition of the plaintiff did not allege that said special security had been exhausted, and that the act of the legislature of the State of Kansas, entitled, "An act concerning private corporations," approved March 6, 1883, and on which the action of the plaintiff was grounded and based, was unconstitutional and void, and in conflict with Sec. 16, Act 2, of the constitution of the State of Kansas.

Third. For that said action was a suit against the executor of the estate of a dead man, and under the constitution and laws of the State of Kansas, the Probate Court of Atchison county, Kansas, and not the District Court of Atchison county, Kansas, had jurisdiction to entertain the claim of the plaintiff. That no attachment could legally issue against the property of the defendant executor, and the said District Court in rendering said judgment and in ordering the sale of said attached property did not give full faith and credit to the public acts and judicial proceedings of the surrogate of the Orphans' Court of Union county, New Jersey, where the estate of George Manley, deceased, was being administered, and did not accord to the defendant, a citizen of the State of New Jersey, all the privileges and immunities of an executor resident in the State of Kansas, as guaranteed by Art. 4, Secs. 1 and 2, of the constitution of the United States, but abridged the privileges of the defendant and deprived him of his property without due process of law, guaranteed him by the fourteenth

amendment to the constitution of the United States. (Transcript of Record, pp. 35 and 36.)

On May 31, 1900, the said defendant filed in said court and cause his motion to withdraw the order of sale issued in said cause for the same reasons as stated in said motion to set aside said judgment. (Transcript of Record, pp. 37 and 38.)

On June 2, 1900, said motions were heard by the court on the pleadings, files and journal entries in said cause, as set out above, and the order of sale issued in said cause, and were each by the court overruled, defendant excepting (Transcript of Record, pp. 38 and 39), and by due proceedings therefor, said defendant, as plaintiff in error, prosecuted his proceeding in error in the Supreme Court of the State of Kansas to reverse the decision and judgment of said court overruling said motions.

On March 9, 1901, the Supreme Court of the State of Kansas "ordered and adjudged that the judgment of the court below be affirmed" (Transcript of Record, p. 42), and also filed its written opinion in said cause in which it held that the Atchison county District Court having jurisdiction of the subject matter and of the parties to the said action, and having rendered its judgment in said action of December 13, 1897, and the defendant therein, the plaintiff in error herein, having failed to effect an appeal from said judgment within the time, and in the manner provided by law, said judgment was res adjudicata as to all matters necessarily involved in said action, and therefore, presumably consider-

ed by the court, save alone said propositions appearing in the record as relate to the jurisdiction of the court over the subject matter and the parties to said action. (Transcript of Record, p. 42.)

In the written opinion of the Supreme Court of the State of Kansas, the federal rights claimed by the plaintiff in error, were fully set forth in the following language, to-wit:

"In each of said motions it was alleged that the court had no jurisdiction to entertain such suit, to render judgment or to order the attached property to be sold to satisfy the same; * * * * that the suit was ~~presented~~ prosecuted against the executor of a dead man, and under our constitution and laws the Probate Court of Atchison county, and not the District Court, had jurisdiction; that no attachment could legally issue against the property of the defendant executor; that section 203 of the executors' and administrators' act is unconstitutional and contravenes section 6, article 3, and section 8, article 3, of the constitution of the State of Kansas; and also violates sections 1 and 2 of article 4, and the 14th amendment to the constitution of the United States, and section 27 of the act of congress creating the Territory of Kansas; that in rendering said judgment said District Court did not give full faith and credit to the public acts and judicial proceedings of the Orphans' Court of Union county, New Jersey, according to the requirements of the constitution of the United States, article 4, section 1, and did not accord to the defendant, a citizen of New Jersey,

the privileges and immunities of an executor resident in this state, contrary to the United States constitution, article 4, section 2, and enforced the said section 203 of the executors' and administrators' act of this state, which abridged the privileges of the defendant, and his immunity from suit by attachment and deprived him of his property without due process of law, and denied him the equal protection of the law, contrary to the14th amendment to the constitution of the United States." (Transcript of Record, p. 44.)

And the Supreme Court of the State of Kansas held in its written opinion, that the one question necessary to be considered and decided was as to whether or not the judgment of December 13, 1897, was absolutely void. That if it was null and void, it could properly be attacked by the motions, the overruling of which constituted the grievance complained of, and if it was not so void it stands as a final determination of all the matters in controversy in the action in which it was rendered, and as to these matters it was res adjudicata. (Transcript of Record, p. 43.)

The court further held that the defendant, the plaintiff in error herein, having voluntarily appeared and plead to the action, the court had jurisdiction of his person, and by Sec. 147, Ch. 107, G. S. Kas. 1897 (Sec. 203 of the executors' and administrators' act of 1868), the defendant being a non-resident executor, jurisdiction over the property in his charge could be obtained by attachment of such property (Transcript of Record, p. 45), and the property so attached could be ordered sold to pay the judgment in said

attachment suit. And the court expressly held that section 203 of the executors' and administrators' act was constitutional as applied to a non-resident executor, the court saying:

"In the case at bar, for more than thirty years our statute providing that foreign executors may sue and be sued in any court of this state, in like manner as suits may be brought by or against non-residents generally, has been in force, has been acted upon and construed by our courts (referring to cases of Cady vs. Bard, 21 Kas. 479, and Donifelser vs. Heyl, 7 Kas. App. 606, affirmed in 59 Kas. 779), and never before, as far as we are able to ascertain, have its provisions been challenged as repugnant to our own constitution, or to that of the constitution of the United States. Indeed, the validity of this section was expressly recognized in Eells vs. Holder, 2 McCreary 622." (Transcript of Record, p. 48.)

On May 4, 1901, the plaintiff presented his petition for a writ of error, with the assignment of errors filed therewith, which was allowed by the Chief Justice of that court (Transcript of Record, pp. 50 and 51), and on the same day the writ of error issued and was allowed by the chief justice of the Supreme Court of Kansas. (Transcript of Record, pp. 51 and 52.)

In the said assignment of errors the claims of federal right of the plaintiff in error were fully set forth (Transcript of Record, pp. 53 to 55), and are set out at length on page 33 of this brief.

On May 4, 1901, plaintiff in error duly gave the required supersedeas bond (Transcript of Record, p. 56), and filed in the Supreme Court of Kansas a citation for the defendant in error, Richard A. Park, with proof of service of the same (Transcript of Record, p. 57), and this case by due proceedings therefor was brought to and filed in this court.

Since the record was filed in this court, Anna O. Park has filed suggestion of the death of the defendant in error, Richard A. Park, and a motion has been filed by said Anna O. Park to be substituted as defendant in error herein.

BRIEF OF PLAINTIFF IN ERROR IN OPPOSITION OF MOTION OF DEFENDANT IN ERROR TO DISMISS OR AFFIRM.

We will discuss the claims of the defendant in error in the order in which they are made.

I.

"THE ATTEMPT TO RAISE THE CLAIMED FEDERAL JUESTION WAS MADE TOO LATE."

The defendant in error contends that a claim of federal right cannot be made after the final decision and on supplementary motions presented after the first appeal. There is no true ground for any such contention in the decisions of this court, and none of the decisions cited by the defendant in error sustain any such contention.

An examination of the cases cited by the defendant in error will show that they do not support any such contention.

In Schudder vs. Coler, 175 U. S. 32, 36, the federal question was not raised until after the case had been finally decided by the Court of Appeals of the State of New Jersey, the highest court of the state.

In Turner vs. Richardson, 180 U. S. 87, the federal right was raised in a petition for a rehearing made in the case after the Supreme Court of Louisiana had given judgment therein.

In Eastern Bldg. & Loan Assn. vs. Welling, 181 U. S. 47, the federal question was raised on motion for a rehearing filed after the Supreme Court of South Carolina had

decided the case and it had been remitted to the trial court.

In Meyer vs. City of Richmond, 172 U. S. 82, 92, Justice Kenna, in deciding the case, said:

"It has been repeatedly decided by this court that to suggest or set up a federal question for the first time in a petition for a rehearing in the highest court of the state is not in time (citing cases)."

But he added:

"In all of these cases (where a federal question is set up for the first time in a petition for a rehearing in the highest court of the state), the federal question was not presented in any way to the lower court, nor to the higher court until after judgment. It is not, therefore, decided that a presentation to the lower court at some stage of the proceedings, and in accordance with its procedure, and a presentation to the higher court before judgment, would not be sufficient."

In Zazoo & M. V. R. Co. vs. Adams, 180 U. S. 1, 7, the federal question was not set up until after the case had been decided by the Supreme Court of the State of Mississippi, and remanded to the lower court for a new trial, and it was raised by new pleas filed without the leave of court, which the state practice required.

The case of Union Mut. Life Ins. Co. vs. Kirchoff, 169 U. S. 103, is discussed at length by the court in Zazoo & M. V. R. Co. vs. Adams, 180 U. S. 1, 7. In the Kirchoff case this court dismissed the writ of error, holding that, as the state Supreme Court refused to reopen the case

as to matters previously adjudicated on a former appeal, as it had a right to do under the state practice, and as the federal question was not set up upon the first appeal, there was no action of the state Supreme Court in relation to it which the Supreme Court of the United States was called upon to revise.

In each of the two last cases the unsuccessful party was caught on a question of practice, or to use the phraseology of the old law writers, was empaled on one of the spears with which Justice guards her portals.

In this case the claim of federal right was raised in the Supreme Court of the state, if not before that, and was decided by that court, and that is all that is required.

In Sully vs. American National Bank, 178 U. S. 209, the claim of federal right was identical with the claim at bar. It was first raised in the Supreme Court of the state, but that was held to be in time.

In that case Justice Peckham, in delivering the opinion of the court, said (page 298):

"In regard to the objection that even Carhart has raised the question too late, we think it is without foundation. He raised it in the Supreme Court, and that court decided it against him, not on the ground that he had not raised it in the lower court, but on its merits, and for the reason that in the judgment of the Supreme Court the statute was a valid and constitutional exercise of the legislative powers of the state."

In Consolidated Coal Co. vs The People, 185 U. S.

203, the claim of federal right was first asserted in a motion in arrest of judgment, and it was held that a denial of such motion presented a federal question which it was the duty of this court to review, although the state Supreme Court in affirming the judgment of the trial court did not in terms pass upon the federal constitutionality of the law.

In Endowment & Benev. Assn. of Kansas vs. Kansas, 120 U. S. 103, the question of the constitutionality of Ch. 13, S. L. Ks. 1885, was first presented in a motion for a new trial in the District Court.

In Clark vs. Pennsylvania, 128 U. S. 395, the federal right was first claimed in certain instructions which were refused by the court.

In Kennebec R. Co. vs. Portland R. Co., 81 U. S. (14 Wall.) 23, it did not appear clearly from the pleadings or decree, or other proceedings in the case, that a federal question was involved; but the federal question was discussed in one part of the opinion of the state Supreme Court, and that court was of the opinion that the state statute complained of did not inpair the obligation of the contract (p. 24), and Justice Miller, in delivering the opinion of the court held (p. 25), that the federal question was sufficiently raised.

In Chicago B. & Q. R. Co. vs. City of Chicago, 166 U. S. 226, the claim of federal right was first made in the motion of the defendant for a new trial.

In Rothschild vs. Knight, 184 U. S. 334, the federal

question was first raised in the Supreme Court of the state.

In Mallett vs. The State, 181 U. S. 589, it was held that even where the federal question is first presented in a petition for a rehearing to the state Supreme Court, it is not raised too late if that court entertains the petition for rehearing and discusses and decides the federal question.

In Green Bay & M. Canal Co. vs. Paper Co., 172 U. S. 58, it was held that if it appeared from the record by clear and necessary intendment, that the federal question must have been directly involved, so that the state court could not have given judgment without deciding it, it will be sufficient.

In Blythe vs. Hinckley, 180 U. S. 333, it was held that a writ of error to a state court from the Supreme Court of the United States will not be dismissed for want of jurisdiction, where a federal question is fairly raised, merely because the claim by which it is presented is not well founded.

In Crapo vs. Kelly, 16 Wall. 610, the controversy was as to the half ownership of Gibbs & Jenny to the ship Arctic. While the vessel was on the high seas, Gibbs & Jenny applied to the judge of the insolvent court of Massachusetts for the benefit of the insolvent law of that state. The judge appointed Crapo and others assignees, and made a deed of assignment to them. Afterwards the Artic arrived at New York, and an attachment was levied upon her by Kelly, the sheriff, in a suit against Gibbs & Jenny. Crapo and his co-assignees then made a claim against

Gibbs & Jenny's interest in the ship. The court of last resort in New York decided against their claim and in favor of the sheriff under his attachment. Up to this time we do not understand from the report that any federal question was expressly raised, but the case was carried to this court by writ of error under the 25th section of the Judiciary Act, it then being claimed that the New York court had disregarded the constitutional provision as to the faith and credit to be given in each state as to public acts, records and judicial proceedings of every other state. The jurisdiction of this court was challenged by Mr. Evarts, who represented Kelly, the sheriff. He said (p. 614), "no adjudication on this controversy has ever yet been had in Massachusetts, and all that the insolvent proceedings in Massachusetts have contributed towards such an adjudication has been to furnish the assignees a standing, which has been fully recognized by the New York court;" but this court held that the New York court necessarily decided what effect the insolvent proceedings in Massachusetts had by law and usage in that state, and that as it decided against the effect which the defendant set up for them, the court had jurisdiction to review the judgment of the New York court: and this court reversed the judgment of the New York court, and decided in favor of the assignee.

On the question of jurisdiction the court reviewed Green vs. Van Buskirk, 5 Wall. 310, on motion to dismiss, and 7 Wall. 139, on the merits. In that case both plaintiff and defendant were residents of New York, and Bates was

a debtor to each; the latter executed and delivered to Van Buskirk in New York a chattel mortgage on certain iron safes in Chicago, but before the mortgage was recorded in Illinois or possession taken under it, Green had an order of attachment issued from an Illinois court and levied upon the safes which were sold under the order and the proceeds were applied in satisfaction of Green's claim. Van Buskirk then brought suit against Green in New York to recover the value of safes, and the question was whether Van Buskirk or Green had the stronger right to the safes. Green claimed among other things that the mortgage to Van Buskirk was fraudulent as against creditors (5 Wall. 316-317); but the court of last resort in New York decided in favor of Van Buskirk. The case was brought to this court under the 25th section of the Judiciary Act, on the ground that full faith and credit had not been given to the judicial proceedings in Illinois. Mr. Carlisle, representing Van Buskirk, moved to dismiss. He said (5 Wall. 309-310): "The record neither shows that the construction of any clause of the constitution was drawn in question by the plaintiff in error in the state court, nor that any right was claimed under such clause, nor that any decision was made against such right; in fact, the clause did not admit of any constitutional question. The defense set up in the state court was only that the safes at the time of the seizure and sale belonged to Bates, and that by such seizure and sale the plaintiff in error acquired Bates' title. The only issue thus formed was as to the right of property and possession

at the time of such seizure; and this was the only issue tried and determined."

In the dissenting opinion delivered by Justice Nelson, and concurred in by Justice Swayne, the former said (p. 316): "It is claimed that this court has jurisdiction on the ground that the court below denied full faith, credit and effect to the Illinois judgment in the attachment proceedings. It is only on this ground that this attachment can be maintained. We have seen that no such point was made on the trial or ruled by the court."

These statements of fact by counsel and the dissenting justices are not controverted, but the majority of the court, whose opinion was delivered by Justice Miller, said (5 Wall. 311), it seemed clear that the state court "did pass upon the effect of the judicial proceedings in Illinois upon the title of the property in contest," and again (5 Wall. 314): "We do not decide that the proceedings in the State of Illinois have there the effect which plaintiff claims for them; because that must remain to be decided after argument on the merits of the case. But we hold that the effect which the proceedings have there by the law and usage of that state was a question necessarily decided by the New York courts, and that it was decided against the claim set up by plaintiff in error under the constitutional provision and statute referred to, and that the case is therefore properly here for review. Motion to dismiss overruled."

The report of the case on the merits (7 Wall. 139, 141, 145), is also instructive on the question of jurisdiction.

In fact we can find no decision of this court which holds that a federal question like the one at bar cannot be raised for the first time in either the printed brief or the oral argument of counsel in the state Supreme Court, if that court considers the federal question and decides it, and its decision is against the claim of federal right, and this conclusion, it seems to us, is a proper one to draw from the language of section 709 R. S. U. S.

And see:

N. Y. Cent. & H. R. R. Co. vs. New York. 22 Sup. Ct. Rep. 916.

Mallett vs. The State, 181 U. S. 589.

II.

"NO FEDERAL QUESTION WAS DECIDED OR NECESSARY TO THE DECISION MADE."

III.

"THE DECISION WAS CLEARLY UPON GROUNDS OTHER THAN A FEDERAL QUESTION AND THIS COURT HAS NO JURISDICTION."

These caims are identical and will be considered together.

In all of the cases cited by counsel this court held that the record did not disclose a case reviewable by this court. In some cases the record did not show a proper claim of federal right, and in others the decision of the court was not necessarily based on a federal question. Such are the cases where the judgment of the state Supreme Court is

based on two grounds, a federal question, and a local question, and the decision of the local question was broad enough to sustain the judgment, independent of the federal question.

The case at bar is not, however, like any of the cases cited by counsel.

In the decision by the Kansas Supreme Court, that court, in its statement of the case (Transcript of Record, p. 44), set out fully the claim of the plaintiff in error, and in its decision it upheld the validity of Sec. 203 of the executors' and administrators' act of the State of Kensas (Sec. 147, Ch. 107, G. S. Ks. 1897), which permits an executor duly appointed in any other state to be sued in any court of the state, in like manner as a non-resident may sue and be sued, and therefore permits the property of a nonresident executor to be attached in like manner and under like restrictions as the property of a non-resident may be attached. (Transcript of Record, p. 49.)

If, as claimed by the plaintiff in error, the Atchison county District Court had no authority to sequester the property of a dead man by proceedings in attachment, or order said attached property sold to pay such judgment, merely because the executor in charge of the estate of the dead man happened to be a non-resident of the State of Kansas, then its judgment and order were absolutely void, and under the Kansas law could be set aside at any time by motion, as was sought to be done in this case.

Section 575 of the Kansas code provides as follows:

"A void judgment may be vacated at any time, on motion of a party, or any person affected thereby."

The motions of the plaintiff in error, to set aside the judgment, and to withdraw the order of sale having been overruled by the Atchison county District Court, the plaintiff had a right to prosecute his proceeding in error to reverse the same under Sections 542 and 543 of the Kansas code, which read as follows:

"Sec. 542. The Supreme Court may reverse, vacate or modify a judgment of the District Court for errors appearing on the record; and in the reversal of such judgment or order, may reverse, vacate or modify any of the following orders of the district court, or a judge thereof: First—A final order. Second—An order that grants or refuses a continuance; discharges or vacates an injunction; that grants or refuses a new trial; or that confirms or refuses to confirm the report of a referee; or that sustains or overrules a demurrer. Third—An order that involves the merits of an action, or some part thereof.

"Sec. 543. An order affecting a substantial right in an action, when such an order in effect determines the action and prevents a judgment, and an order affecting a substantial right, made in a special proceeding or upon a summary application in an action after judgment, is a final order, which may be vacated, modified or reversed as provided in this article."

In Winkfield vs. Brinkman, 31 Ks. 26, it was held that where the judgment was void, the defendant could file his

motion in the District Court to set aside such judgment, upon the ground that it was void, and if such motion is denied by the District Court, proceedings in error may be commenced in the Supreme Court within one year after the demand of such motion, even when one year has already elapsed after the rendition of the judgment.

We therefore have a final judgment in a suit in the highest court of the State of Kansas, in which a decision in the suit could be had, where is drawn in question the validity of a statute of the State of Kansas (Section 203 of the executors' and administrators' act), or an authority exercised under any state (Cady vs. Bard, 21 Ks. 479; Donifelser vs. Heyl, 7 Ks. App. 96; 59 Ks. 779), on the ground of their being repugnant to the constitution of the United States (Sections 1 and 2, Art. 4, and the 14th Amendment), and the decision is in favor of their validity, and where a right, privilege or immunity is claimed under the constitution of the United States and the decision is against such right, privilege, or immunity, specially set up or claimed by the plaintiff in error, under such constitution, which may be re-examined and reversed or affirmed in this court upon a writ of error. (Rev. Stat. U. S., Sec. 709.)

In this case if the claim of the plaintiff in error is well founded, the judgment of the Atchison county District Court was not merely voidable, but was absolutely void for want of jurisdiction in that court. Such being the case, it could be set aside on motion as was attempted in this case.

It is not questioned by any one that the proceedings of

the plaintiff in error were proper proceedings under the Kansas practice, and the sole question was as to the validity of the judgment of December 13, 1897. If it was a valid judgment, it would have to stand as such, but if it was an invalid and void judgment, the Atchison District Court should have set aside.

And this is the position taken by the Kansas Supreme Court, for in its opinion it said:

"The one question necessary for us to consider in the present status of this case is, was the judgment of December 13, 1897, absolutely void? If it was null and void, it could properly be attacked by the motions, the overruling of which constitutes the grievance now complained of, and if not so void, it stands as a final determination of all the matters in controversy in the action in which it was rendered, and as to those matters it is res adjudicata." (Transcript of Record, p. 45.)

The Kansas Supreme Court held that the judgment of December 13, 1897, was a valid judgment, and that the rights of plaintiff in error had been finally determined by that judgment. But to hold that it was a valid judgment it was necessary for that court to decide, and it did decide, that Sec. 203 of the executors' and administrators' act was a valid statute, and that, as construed in that case, it did not deny to the plaintiff in error any of his claimed federal rights.

Such a decision is not binding on this court because the question of res judicata is a local question, for the reason

that the decision when based on that ground is not broad enough to sustain the judgment independent of the federal question.

In National Foundry & Pipe Works vs. Oconto City Water Supply Co., 183 U. S. 216, it was held that a federal question is presented by a contention that due effect to a decree of a federal court was denied by the action of the court below in sustaining a plea of res judicata predicated on a decree of such federal court, where a determination whether the court correctly applied the plea necessitates deciding whether by sustaining such plea rights were denied which were vested under another decree of the federal court.

In that case the court, speaking by Justice White, said:

"The proposition substantially is that the state court, in maintaining the plea of res judicata resulting from the decree in the creditors' suit, denied the rights which were vested in the pipe works by virtue of the decree in the mechanic's lien suit. The argument in substance is, therefore, that, as the rights under the mechanics' lien decree were not impaired or destroyed by the decree in the creditors' suit, the consequence of erroneously deciding that they were obliterated by the decree in the creditors' suit was to refuse to give due effect to the rights vested in the water company as a result of the decree in its favor in the mechanic's lien suit.

"As it is thus demonstrated that the determination whether the court below correctly applied the plea of res

judicata necessitates our deciding whether due effect was given to the decree in the mechanics' lien suit, a federal question is presented which it is our duty to determine."

In Capital City Dairy Co. vs. State ex rel, 183 U. S. 238, it was held that a writ of error to review a judgment of a state court ousting a corporation from its franchise for violation of the statutes of the state relating to the manufacture and sale of oleomargarine will not be dismissed on the ground that adequate support for the judgment irrespective of any substantial federal question, is afforded by the finding of the state court that the corporation had violated a statute in refusing to furnish samples as therein required, where the judgment of the court was based upon the consideration given by it to all the asserted violations of the statutes jointly, which statutes were contended to be repugnant to the constitution of the United States.

In that case the court, speaking by Justice White, said:

"Before disposing of the controversies presented by the assignment of errors, it is necessary to notice a motion of the defendant in error to dismiss. It is predicated upon the ground that as the court below found the defendant had violated the statute in refusing to furnish samples as required by the law of 1884, this affords adequate support for the judgment of ouster, irrespective of any substantial federal question. It is true, in the pleadings it was not asserted that the provision of the Ohio law requiring the delivery of samples was repugnant to the constitution of the United States, but in the certificate made by the Supreme

Court of Ohio on the day its opinion was announced, it is certified that for the purposes of the decision of the case it became necessary to determine whether the act of 1884, providing for the delivery of such samples, was repugnant to the constitution of the United States. Conceding that the certificate can only serve to aid in eludicating whether a federal question was presented by the record, and that such certificate cannot, independently in and of itself, impart into the record such a question when not otherwise properly inferable from the record, we do not think the motion to dismiss well taken. We cannot, from an inspection of the opinion of the Supreme Court of the State of Ohio, conclude that the judgment of ouster which the court rendered was predicated alone upon the fact that the defendant had failed to deliver samples as required by the statute. On the contrary, we think the context of the opinion of the court demonstrates that the judgment against the corporation was based upon, not alone the mere failure to deliver the samples, but because of that failure, as connected with and explained by the acts of the corporation, in continuously, and, as described by the court, flagrantly, violating, not one, but most of the other statutes relied on."

In M. K. & T. Ry. Co. vs. Elliott, 184 U. S. 695, it was held that the fact that a state court, in deciding a federal question, erroneously declares that no federal question exists, does not preclude a review of its decision on writ of error from the Supreme Court of the United States.

In Anderson vs. Carkins, 135 U. S. 483, the court said:

"It is immaterial that the state court considered the case to be within the provisions of certain state statutes. The grasp of the federal statute must first be released. The construction and scope of that are federal questions, in respect to which the party who claims under such statute, and whose claim is denied, has a right to invoke the judgment of this court."

In Columbia Water Power Company vs. Light and Power Company, 172 U. S. 475, it was held that the fact that a case involving the question of the impairment of a contract by state legislation is disposed of by the state court upon a construction of the contract does not deprive the Supreme Court of jurisdiction to review such decision, it being the duty of that court in such cases to determine for itself the proper construction of the contract upon which the plaintiff relies.

In that case Justice Brown, speaking for the court, said (page 487):

"While, in so holding, the court disposed of the case upon the construction of the contract under which the plaintiff asserted its right, such question is no less a federal question than would be the case if the construction of the contract were undisputed, and the point decided upon the ground that the subsequent act confirming the contract with the defendant did not impair it. The question in either case is whether the contract has been impaired, and that question may be answered either by holding that there is no

contract at all, or that the plaintiff had no exclusive rights under its contract, or granting that it had such exclusive rights, that the subsequent legislation did not impair it. These are rather differences in the form of expression than in the character of the question involved, and this court has so frequently decided, notably in the very recent case of McCullough vs. Virginia, 172 U. S. 102, that it is the duty of this court to determine for itself the proper construction of the contract upon which the plaintiff relies, that it must be considered no longer as an open question (citing cases)."

In First National Bank vs. Anderson, 172 U. S. 573, it was held that where a national bank defended against an action for the conversion of collaterals, which plaintiff alleged it had agreed to sell him, on the ground that it was prohibited by the national banking act from making such a contract, and that such prohibition exempted it from any liability whatever growing out of the transaction, a decision of the state court permitting a recovery by plaintiff necessarily determined the contention of exemption adversely to the defendant, and was reviewable by the Federal Supreme Court, although the judgment of the state court was based on general principles of law, independently of the question of ultra vires, citing,

Bank vs. Townsend, 139 U. S. 67.

We think it is clear from the above authorities that the motion of the defendant in error to dismiss or affirm should be overruled.

SPECIFICATION OF ERRORS.

I.

Richard A. Park, as plaintiff, commenced his action against William H. Risk, executor of the estate of George Manley, deceased, as defendant, in the District Court of Atchison County, Kansas, by attachment and on the ground that the defendant was a non-resident of the State of Kansas. Reuben M. Manley succeeded the said William H. Risk, as executor of said estate, and said action was revived against him. On December 13, 1897, judgment was rendered in said action in favor of the plaintiff therein, Richard A. Park, and against the defendant therein, Reuben M. Manley, executor of the estate of George Manley, deceased, for $2,463.07, with interest at the rate of six per cent per annum and costs of suit, and certain real property of said defendant therein, so attached, was ordered sold to satisfy said judgment and costs. On May 31, 1900, the defendant in said suit, Reuben M. Manley, executor of the estate of George Manley, deceased, filed his motion in the said District Court of Atchison County, Kansas, to set aside the said judgment, and also his motion to set aside the order and judgment of said court ordering the property attached in said action to be sold to satisfy said judgment, for that the said District Court of Atchison County, Kansas, had no jurisdiction to entertain said suit, or to render

judgment therein, or to order the property attached therein to be sold to satisfy said judgment; that said action was a suit against the executor of the estate of a dead man, and under the constitution and laws of the State of Kansas, the Probate Court of Atchison County, Kansas, and not the District Court of Atchison County, Kansas, had jurisdiction to entertain the claim of the plaintiff; that no attachment could legally issue against the property of the defendant executor, and the said District Court of Atchison County, Kansas, in rendering said judgment, and in ordering the sale of said attached property did not give full faith and credit to the public acts and judicial proceedings of the surrogate of the Orphans' Court of Union County, New Jersey, where the estate of George Manley, deceased, was being administered, and did not accord to the defendant, a citizen of the State of New Jersey, all the privileges and immunities of an executor resident in the State of Kansas, as guaranteed by Art. 4, Secs. 1 and 2, of the constitution of the United States, but abridged the privileges of the defendant and deprived him of his property without due process of law, guaranteed him by the fourteenth amendment to the constitution of the United States. That on June 2, 1900, said motions were heard and were each overruled by the District Court of Atchison County, Kansas, and by due proceedings therefor said matter and cause were taken on error to the Supreme Court of the State of Kansas, and said court, by its decision and judgment, affirmed the decision and judgment of the said District

Court of Atchison County, Kansas. And the Supreme Court of the State of Kansas erred in affirming the decision and judgment of the District Court of Atchison County, Kansas, in refusing to set aside said judgment.

II.

The Supreme Court of the State of Kansas erred in affirming the decision and judgment of the District Court of Atchison County, Kansas, in refusing to set aside the said order and judgment ordering the property attached in said action to be sold to satisfy said judgment.

III.

The Supreme Court of the State of Kansas, erred in that it did not give full faith and credit to the public acts and judicial proceedings of the surrogate of the Orphans' Court of Union County, New Jersey, where the estate of George Manley, deceased, was being administered, as required by section 1 of article 4, of the constitution of the United States, in that it decided that the property of the estate of George Manley, deceased, and of Reuben M. Manley, the executor of said estate, could be attached in an action for debt brought in the District Court of Atchison County, Kansas, against the executor of said estate by attachment, and that said property so attached could be sold to satisfy said judgment.

IV.

The Supreme Court of the State of Kansas, erred in that it did not accord the defendant, in said suit, the plaintiff in error herein, a citizen of the State of New Jersey, all

of the privileges and immunities of an executor resident in the State of Kansas, as guaranteed by section 2 of article 4 of the United States, in that it decided that the property of the estate of George Manley, deceased, and of Reuben M. Manley, the executor of said estate, could be attached in an action for debt brought in the district court of Atchison County, Kansas, against the executor of said estate, and that said property so attached could be sold to satisfy said judgment, when the property of an executor, resident in the State of Kansas, was not subject to attachment process and could not be ordered sold to satisfy a judgment for debt by execution or order of sale on proceedings by attachment, and discriminated against him in that regard solely because he was a non-resident of the State of Kansas.

V.

The Supreme Court of the State of Kansas, erred in that it enforced a law or laws of the State of Kansas, which abridged the privileges and immunities of the defendant in said suit, the plaintiff in error herein, and citizen of the United States, and deprived him of his property without due process of law, and denied him the equal protection of the laws, guaranteed him by the fourteenth amendment to the constitution of the United States, in that it decided that the property of the estate of George Manley, deceased, and of Reuben M. Manley, the executor of said estate, could be attached in an action for debt brought in the District Court of Atchison County, Kansas, against the

executor of said estate, and that the property so attached could be ordered sold to satisfy said judgment, when the property of an executor, resident of the State of Kansas, was not subject to attachment process and could not be ordered sold to satisfy a judgment for debt by execution or order of sale on proceedings by attachment, and discriminated against him in that regard solely because he was a non-resident of the State of Kansas.

VI.

The Supreme Court of the State of Kansas erred, in that it decided that the rights of the defendant in said suit, the plaintiff in error herein, were concluded by the judgment of the District Court of Atchison County, Kansas, rendered on December 13, 1897, because said judgment was void on its face for the reason that it was rendered against an executor of an estate, and because the property of a dead man was ordered sold to satisfy an ordinary judgment in attachment proceedings rendered against the executor of said estate, and said judgment was rendered and order of sale of attached property made solely because the executor of said dead man was a non-resident of the State of Kansas, and said judgment and order of sale of attached property would have been void if given and made against an executor resident of the State of Kansas, thereby depriving said non-resident executor of his privilege of administering said estate under the orders of the surrogate of the Orphans' Court of Union County, New Jersey, and of the Probate Court of Atchison County, Kansas, and of his

immunity from suits in the District Court of Atchison County, Kansas, by attachment, and depriving him of his property without due process of law and denying him the equal protection of the laws.

BRIEF OF THE ARGUMENT.

For convenience we think it would be better to present all of the specifications of error together.

FIRST:—UNDER THE CONSTITUTION AND LAWS OF THE STATE OF KANSAS, AN EXECUTOR, RESIDENT IN THE STATE OF KANSAS, COULD BE SUED IN A DISTRICT COURT OF THE STATE, BUT THE PROPERTY IN HIS CHARGE COULD NOT BE ATTACHED, NOR SOLD ON EXECUTION.

The constitutional and statutory provisions applicable are as follows:

"Section 6.—The District Courts shall have such jurisdiction in their respective districts as may be provided by law." (Sec. 6, Art. 3, Constitution.)

"Sec. 1.—There shall be in each county, organized for judicial purposes, a district court, which shall be a court of record, and shall have general original jurisdiction of all matters, both civil and criminal (not otherwise provided by law), and jurisdiction in cases of appeal and error from all inferior tribunals, and shall have a general supervision and control of all such inferior courts and tribunals, to prevent and correct errors and abuses." (Par. 1961, G. S. Ks. 1889.)

"Section 8.—There shall be a probate court in each county which shall be a court of record, and shall have such probate jurisdiction and care of estates of deceased persons, minors and persons of unsound minds, as may be prescribed by law." (Sec. 8, Art. 3, Constitution.)

"Section 80.—All demands against the estate of any deceased person shall be divided into the following classes: First—Funeral expenses. Second—Expenses of the last sickness, wages of servants, and demands for medicines and medical attendance during the last sickness of the deceased, and the expenses of administration. Third—Debts due the state. Fourth—Judgments rendered against the deceased in his lifetime; but if any such judgments shall be liens upon the real estate of the deceased, and the estate shall be insolvent, such judgments as are liens upon the real estate shall be paid without reference to classification, except the classes of demands mentioned in the first and second sub-divisions of this section shall have precedence of such judgments. Fifth—All demands, without regard to quality, which shall be legally exhibited against the estate within one year after the granting of the first letters on the estate. Sixth—All demands thus exhibited after the end of one year and within two years after letters granted. Seventh—All demands thus exhibited after the expiration of two years, and within three years after granting of such letters." (Sec. 80, Executors' and Administrators' Act; Par. 2864 G. S. Ks. 1889.)

"Section 83.—All actions commenced against such ex-

ecutor or administrator, after the death of the deceased, shall be considered demands legally exhibited against such estate, from the time of serving the original process on such executor or administrator." (Sec. 83 Ex. and Adm. Act; Par. 2867, G. S. Ks. 1889.)

"Section 84.—Any person may exhibit his demand against such estate by serving upon the executor or administrator a notice, in writing, stating the nature and amount of his claims, with a copy of the instrument of writing or account upon which the claim is founded, and such claim shall be considered legally exhibited from the time of serving such notice." (Sec. 84 Ex. and Adm. Act; Par. 2868 G. S. Kas. 1889.)

"Section 86.—Any person having a demand against an estate may establish the same by the judgment or decree of some court of record, in the ordinary course of proceeding, and exhibit a copy of such judgment or decree to the probate court; but the estate shall not be liable for costs in any such proceeding commenced within one year from the date of the letters of administration." (Sec. 86, Ex. and Adm. Act; Par. 2870 G. S. Ks. 1889.)

It is manifest from the constitutional and statutory provisions, quoted above, that the Probate Courts in Kansas are given exclusive jurisdiction in the matter of allowing claims against the estate of a deceased person. Suits, however, may be instituted in any court of record to establish any such claim (Sec. 86, supra), but such judgment cannot be enforced by execution, but must be exhibited in and

allowed and paid by order of the probate court (Secs. 80 and 86, supra). And, of course, the property of the estate cannot be attached, for in the case of a judgment for the plaintiff in an attachment proceeding, the attached property is sold "under the same restrictions and regulations as if the same had been levied on by execution." (Sec. 222, Civil Code; Par. 4317, G. S. Kas. 1889.)

It is the established law in Kansas that the property of a dead man cannot be sold under an execution issued on a judgment rendered against his executor.

Achenbach vs. Pomeroy Coal Co., 2 Ks. App. 357.

Mendenhall vs. Burnette, 58 Ks. 355.

SECOND: UNDER THE CONSTITUTION AND STATUTES OF THE STATE OF KANSAS, NO AUTHORITY EXISTS FOR ATTACHING THE PROPERTY IN CHARGE OF A NON-RESIDENT EXECUTOR.

The constitutional and statutory provisions applicable to this enquiry are sections 6 and 8, article 3, constitution of Kansas, par. 1961, G. S. Ks., 1889, and sections 80, 83, 84 and 86 of the executors' and administrators' act, quoted above, and the following additional statutes:

"Section 1.—That upon the decease of any inhabitant of this state, letters testamentary or letters of administration on his estate shall be granted by the probate court of the county in which the deceased was an inhabitant or resident at the time of his death; and when any person shall die intestate in any other state or county, leaving any estate to

be administered within this state, administration thereof shall be granted by the probate court of any county in which there is any estate to be administered." (Sec. 1 Ex. and Adm. Act; par. 2785 G. S. Ks. 1889.)

"Section 7.—If any person who is appointed an executor shall refuse to accept the trust, or if, after being duly cited for that purpose, he shall neglect to appear and accept the same, or if he shall neglect, for twenty days after probate of the will, to give bond as before prescribed, the court shall grant letters testamentary to other executors, if there be any capable and willing to accept the trust; and if there be no such other executor, the court shall commit administration of the estate, with the will annexed, to the widow of the deceased, or to his next of kin, or to such other person as would have been entitled thereto, if the deceased had died intestate." (Sec. 7 Ex. and Adm. Act; par. 2791 G. S. Ks. 1889.)

"Section 11.—No executor named in a will shall, before letters testamentary are granted, have any power to dispose of any part of the estate of the testator, except to pay funeral charges; nor to interfere in any manner with such estate, farther than is necessary for its preservation." (Sec. 11 Ex. and Adm. Act; par. 2795 G. S. Ks. 1889.)

"Section 23.—When any executor or administrator shall, after being notified by a party in interest or cited by the court, neglect to render his accounts * * * *, or when the court shall be satisfied that such estate is not being administered for the advantage of the real parties in interest,

or that any executor or administrator has or is abusing his trust in any respect, it shall be the duty of the court, upon due hearing therefor had, to remove such executor or administrator." (Sec. 23 Ex. and Adm. Act; par 2807 G. S. Ks. 1889.)

"Section 28.—Letters testamentary and of administration shall in no case be granted to a non-resident of this state." (Sec. 28 Ex. and Adm. Act; par. 2812 G. S. Ks. 1889.)

"Section 144.—When an executor or administrator shall be appointed in any other state, territory or foreign country on the estate of any person dying out of this state, and no executor or administrator thereon shall be appointed in this state, the foreign executor or administrator may file an authenticated copy of his appointment in the probate court of any county in which there may be any real estate of the deceased; after which he may be authorized, under an order of the court, to sell real estate for the payment of the debts or legacies and the charges of administration, in the same manner and upon the same terms and conditions as are prescribed in the case of an executor or administrator appointed in this state." (Sec. 144 Ex. and Adm. Act; par. 2929 G. S. Ks. 1889.)

"Section 174.—When administration shall be granted in this state on the estate of any person who, at the time of his decease, was an inhabitant of any other state or country, such estate shall be administered and distributed according to the laws of this state; and the balance in the

hands of the administrator, on final settlement, to which the foreign executor or administrator of said deceased may be entitled, shall be paid over to such foreign executor or administrator, upon the order of the court." (Sec. 174 Ex. and Adm. Act; par. 2960 G. S. Ks. 1889.)

"Section 203.—An executor or administrator, duly appointed in any other state or country, may sue or be sued in any court in this state, in his capacity of executor or administrator, in like manner and under like restrictions as a non-resident may sue or be sued." (Sec. 203 Ex. and Adm. Act; par. 2989 G. S. Ks. 1889.)

"Section 24.—Authenticated copies of wills, executed and proved according to the laws of any state or territory of the United States, relative to any property in this state, may be admitted to record in the probate court of any county in this state where any part of such property may be situated; and such authenticated copies, so recorded, shall have the same validity as wills made in this state, in conformity with the laws thereof." (Sec. 24 Wills' Act; par. 7228 G. S. Ks. 1889.)

"Section 28.—After allowing, and admitting to record, a will, persuant to the four preceding sections of this act, the court may grant letters of administration with the will annexed, and may proceed to the settlement of the estate that may be found in this state; and the executor taking out letters, or the administrator with the will annexed, shall have the same power to sell and convey real estate and personal estate, by virtue of the will or the law, as other ex-

ecutors or administrators with the will annexed, shall or may have by law." (Sec. 28 Wills' Act; par. 7232, G. S. Ks. 1889.)

"Section 29.—No will shall be effectual to pass real or personal estate, unless it shall have been duly admitted to probate, or rendered, as provided in this act." (Sec. 29 Wills' Act; par. 7233 G. S. Ks. 1889.)

It will be noticed from a reading of the above statutes that a discrimination is made against non-residents, by Sec. 28 of the Executors' and Administrators' Act, but that section refers to letters testamentary or of administration issued upon the estate of any inhabitant of the State of Kansas, or letters of administration issued upon the estate of a person who died intestate in any other state or country, as provided in section 1 of the executors' and administrators' act. The issuing of letters testamentary to a non-resident executor is plainly allowable under section 144 of the executors' and administrators' act, and sections 24 and 28 of the Wills act.

It will also be noticed that if a non-resident of Kansas dies intestate his property situate in the State of Kansas is exempt from suits by attachment in the district court and is placed under the exclusive control of the probate court.

And the property of a non-resident executor is fully protected from attachment suits and placed in the custody of the probate court by the above statutes.

Thus section 144 of the Executors' and Administrators' act permits the non-resident executor to file an authenti-

cated copy of his will in the probate court of the county, in which there may be any real estate of the deceased, after which he may be authorized, under an order of the probate court, to sell real estate for the payment of debts "in the same manner and upon the same terms and conditions as are prescribed in the case of an executor or administrator appointed in this state." And section 28 of the Wills act provides that after the foreign will is admitted to probate, the court may grant letters testamentary thereon, and the executor taking out letters "shall have the same power to sell and convey real and personal estate, by virtue of the will or the law, as other executors or administrators, with the will annexed, shall or may have by law."

Nor is the grasp of the probate court over the property in charge of a non-resident executor released by reason of the neglect or refusal of such executor to probate his will in Kansas, and proceed to act as such executor. By section 7 of the Executors' and Administrators' act such executor may be cited by the court to qualify, and upon his refusal, the probate court shall commit administration of such estate, with the will annexed, to some other person, and under section 23 of the same act there is a like power of removal. Section 144 of the same act provides for the appointment of an executor, where the non-resident executor has not filed an authenticated copy of his will in the probate court, as provided for in said section, and section 174 of the Executors' and Administrators' act, and sections 24 and 28 of the Wills' act, plainly recognize the power of

the probate court to administer on the estate confided to the charge of a non-resident executor.

If these statutes do not confer jurisdiction, and exclusive jurisdiction, on the probate courts of the state, it would be difficult to frame statutes that would.

In the case at bar we have the estate of a deceased person, and the control of such estate is "prescribed by law" in the probate court. Why is not this jurisdiction exclusive under section 8 of article 3 of the Kansas constitution, and paragraph 1961 G. S. Ks. 1889, quoted above?

If the defendant in error had a valid claim against the estate of George Manley, deceased, he had a plain and adequate remedy given him by the Kansas laws for the payment of the same by proceedings therefor had in the Atchison County Probate Court. He could have exhibited his demand against said estate under section 84 of the Executors' and Administrators' act, or he could have established his demand under section 86 of said act, by obtaining judgment thereon in the Atchison County District Court, and have exhibited a copy of such judgment in the Probate Court for allowance, but if he sued and obtained judgment in the District Court he would not be allowed for the costs made in the District Court. Such judgment when exhibited in the Probate Court, would be allowed and classified under section 80 of said act, and would be paid under the order of the Probate Court, the same as any other demand against the estate of the same class, but it could not be collected by an execution issued on said District Court

judgment. There is no question in this case of the right of the defendant in error to sue the plaintiff in error for debt, in any court of record in the state, for that right is given by section 86, supra, and applies as well to suits against resident executors as to suits against non-resident executors. The plaintiff in error admits he was liable to suit in any court of record of the state to establish a debt against the estate in his charge, but he denies the right of the defendant in error to obtain jurisdiction either over his person, or over the property in his charge, by proceedings in attachment, such as were had in this case.

The case of Achenbach vs. Pomeroy Coal Co. (2 Ks. App. 357), is exactly in point. In that case it was held that an individual creditor could not, by execution, absorb more than his pro rata share of the dead man's estate. If he cannot do so by attachment, for in case of a judgment for the plaintiff in the attachment proceedings the attached property is sold "under the same restrictions and regulations as if the same had been levied on by execution." (Sec. 222, Civil Code of 1889.)

An attachment of goods by a state officer pre-supposes a right to take possession and custody of those goods, and to make such possession and custody exclusive. If the officer attaches upon mesne process he has a right to hold the possession to answer to exigency of the process.

Harris vs. Drurie, 3 Pet. 304.

Taylor vs. Caryl, 20 How. 596.

In 19 Am. & Eng. Enc. L. (1st Ed.), p. 162, the text

says that in Great Britain, the United States, and other countries subject to institutions of English origin, the estate of a dead man is administered and distributed under the supervision of a local court, whose jurisdiction is confined in whole or in part to such matters.

Gumee vs. Maloney, 38 Cal. 85; s. c. 99, Am. Dec. 357.

By the express provision of our state constitution (Sec. 8, Art. 3), the probate court has "such jurisdiction and care of estates of deceased persons, minors and persons of unsound minds, as may be prescribed by law." And it is prescribed by law that a foreign executor may, by taking certain appropriate proceedings, be authorized "under the order of the court to sell real estate for the payment of debts or legacies and the charges of administration, in the same manner and upon the same terms and conditions as are prescribed in the case of an executor or administrator appointed in this state." (Sec. 144, Exrs. and Admrs. Act.) If a foreign executor has neglected to qualify in Kansas, under Sec. 144 of the Exrs. and Adms. Act (paragraph 2020, Genl. Stats. Ks., 1889), such neglect does not give a creditor a right to attach the property of the dead man situate in Kansas, but the remedy of such creditor is in equity, for the property of a dead man is a trust fund, and equity will never allow a trust fund to be wasted or destroyed for want of a trustee to protect it, and a creditor, by proceedings in equity, may compel the foreign executor

to qualify, or upon his neglect or refusal to do so, appoint a trustee or receiver for the property.

20 Am. & Eng. Enc. L. (1st Ed.), p. 306.

20 Am. & Eng. Enc. L. (1st Ed.), p. 319.

20 Am. & Eng. Enc. L. (1st Ed.), p. 321.

Johnson's Appeal, 9 Pa. St. 416.

Sec. 174, Ex. and Ad. Act.

For the refusal or neglect of a foreign executor to prove the will, qualify and give bond, will be considered as a refusal of the trust.

7 Am. & Eng. Enc. L. (1st Ed.), p. 123, n. 2.

Sawyer's Appeal, 16 N. H. 459.

Or the foregoing executor may be cited to accept the same under Sec. 7, Executors' and Administrators' Act, and upon his refusal, another executor may be appointed by the Probate Court.

7 Am. & Eng. Enc. L. (1st Ed.), 302.

7 Am. & Eng. Enc. L. (1st Ed.), 399, 400

Stebbins vs. Lathrop, 4 Pick. 33.

The constitutional requirement that the probate court shall have the care of the estates of deceased persons cannot be abrogated by giving such a construction to Sec. 203 of the Executors' and Administrators' Act (Paragraph 2989, Gen. Stats. Ks. 1889), as would, in effect, place the care of such estates in the law side of the district court.

The district court has such jurisdiction, and such jurisdiction only, as may be provided by law. (Sec. 6, Art. 3, Const. Ks.)

By law the district court is given general original jurisdiction of all civil or criminal proceedings not otherwise provided by law, and appellate and supervisory jurisdiction over the probate court and other inferior courts. (Par. 1961, G. S. Ks. 1889.) It has no probate jurisdiction, for that is otherwise provided by the law in the probate court, and it can get no jurisdiction by this proceeding to administer the estate of George Manley, deceased, situate in Kansas, for no Kansas decision can be found giving to the district court any other than an equitable jurisdiction over the assets of the estates of deceased persons.

"It is true that the district court has jurisdiction of some matters relating to the estates of deceased persons, but it is an equitable jurisdiction, not to be exercised where the plaintiff has a plain and adequate remedy by ordinary proceedings in a tribunal especially provided by the statute."

Keith vs. Guthrie, 59 Ks. 200, 201.

Proctor vs. Piclow, 57 Ks. 119.

Stratton vs. McCandless, 27 Ks. 305.

The questions, constitutional and otherwise, now presented, were not urged nor discussed in Cady vs. Bard, 21 Ks. 667, and that decision does not go to the extent claimed by the defendant in error, for Judge Brewer held that "jurisdiction to any extent required the overruling of the motion to set aside the service." (Last part of opinion.)

In Cady vs. Bard, the action was brought by Cady against R. W. Bard and another, as executors of the estate

of G. W. Bard, deceased, to foreclose a mortgage given by G. W. Bard in his life time. On the affidavit of the plaintiff that the defendant executors were non-residents, an attachment was issued and levied on the mortgaged land.

Under the law Cady had a right in foreclosing his mortgage to get service on the non-resident defendants by publication, which he did. His attaching the mortgaged land was, therefore, an idle proceeding. No other than the mortgaged property was attached, so that no question arose in that case regarding an attachment of property in the custody of the probate court, for Cady had a right to foreclose his mortgage in the district court, regardless of the probate court.

Shoemaker vs. Brown, 10 Ks. 283.

Johnson vs. Cain, 15 Ks. 532.

The foreign executors appeared specially and moved the court to set aside, not the attachment, but the service on them of process in the foreclosure action by publication, which motion the district court sustained. Such decision of the district court was properly reversed by the supreme court because service could be had against them by publication in an action to foreclose a mortgage (Sec. 72, Civil Code of 1889), and "jurisdiction to any extent required the overruling of the motion to set aside the service."

The question involved in Cady vs. Bard, supra was again before this court in Heyl vs. Donifelser, 59 Ks. 779, but was left undecided by that court, and the decision of the Supreme Court of Kansas in this case is the first decision

of that court which holds that the property in charge of a non-resident executor can be attached for an ordinary debt.

The claim that the only way to get jurisdiction of the defendant is to attach the property in Kansas, is not tenable. As we have indicated above, a suit in equity could have been maintained to compel him to qualify, or upon his default, to have a receiver appointed; and in such an action, service could be had by publication.

See 72 Civil Code.

Murray vs. Murray, 115 Cal. 266.

In the case of Achenbach vs. Pomeroy Coal Co., (2 Ks. App. 357), the Kansas Court of Appeals, northern department, held that the summary proceedings by execution to enforce the individual liability of a stockholder, in an insolvent corporation, cannot be employed to enforce such liability against the estate of a deceased stockholder, which is in course of settlement in the probate court, and in its opinion the court said:

"The only purpose and object of the proceeding is to authorize the issuing of an execution against property. Beyond that the finding and order of the court do not go. In principle, we see no difference between such a proceeding against the estate of a deceased stockholder and an application for an execution on an ordinary judgment against the administrator in his official capacity. It needs no argument to show that the common remedies, by execution and attachment, which are generally available to a creditor for the purpose of enforcing his judgment, cannot be used, after

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the death of the judgment creditor, to reach the assets of his estate. As said in Strouse vs. Lawrence, 160 Pa. St. 421; 28 Atl. 930. 'If this can be done as to one asset of a decedent's estate, it can be done as to all, and any creditor with a claim sufficient to absorb the whole personal estate of a decedent, can, by process of attachment execution on a judgment obtained after the death of the decedent, appropriate the entire estate to the payment of the debt, to the exclusion of all other creditors.' We know of no reason why one seeking to enforce the liability of a deceased stockholder in an insolvent corporation should be put upon a more favorable footing than an ordinary judgment creditor of the deceased. The law contemplates that all general creditors, having demands of the same class against the estate of a deceased person, shall be upon an equality, and shall be paid pro rata out of the estate, in the due course of its administration in the probate court. To permit an execution to be issued against the assets of an estate in the hands of an administrator, in favor of any creditor or claimant, would do violence to the whole spirit of the law concerning the settlement of estates of deceased persons, and would result in an unwarranted interruption of any orderly administration. If it be suggested that the order of the court need not be carried out by the actual issuance and service of the execution, the query arises, for what purpose was the order made? If it is not to be enforced, why this useless expense to the estate? We are clearly of the opinion that this summary remedy is not available in such cases."

The case of Mendenhall vs. Burnette, 58 Ks. 355, is directly in point.

In that case the question involved was whether a creditor who had obtained a judgment against a debtor who died after judgment was rendered against him, could, after reviving his judgment, collect the same on execution, and it was held that such creditor could collect such judgment only out of the real property that was bound by the lien of such judgment, but that he could not collect the same out of the personal property of the estate, nor out of the land to which the lien of the judgment did not attach.

The court, in its opinion, after quoting paragraphs 2116, 2898, 2864, 2870 and 2919 Genl. Stats. Ks. 1889, and Secs. 439, 512 and 419 of the Code, says:

"It is contended by those provisions the legislature has confided the entire management of the estate of a deceased person not incumbered with special liens at the time of his death to the probate court; that divided control is not desirable, and was not contemplated by the legislature, but that it is the policy to vest in one tribunal full jurisdiction, to the end that the property may be best preserved and distributed to those entitled to it. That the district court has jurisdiction to enforce specific liens on the real property of a deceased person is well settled, and not controverted by counsel in this case. (Brenner vs. Bigelow, 8 Ks. 496. Shoemaker vs. Brown, 10 Ks. 883; McLean vs. Webster, 45 Ks. 644.) Indeed, the powers of the probate court would be quite inadequate to the adjustment of all the var-

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ious liens, claims to, and interests in real estate which are frequently necessary to be determined in actions for the foreclosure of a mortgage or other specific lien. * * * So far as the cases relied on by the plaintiff give countenance to the proposition that a general execution may issue against property on which the judgment creditor has no lien, we think the language used was obiter dictum, and that it never was the purpose of the legislature to authorize an execution against personal property not seized or subject to any specific lien at the time of the death of the debtor, or against lands on which the judgment was not a lien prior to the debtor's death. The execution authorized is special to enforce the lien, and not general against all the property."

In Williams, Admr. vs. Benedict, 8 How. 107, Thomas Williams was granted letters of administration on the estate of Benjamin J. Baldwin, deceased, in October, 1838. At the time said letters were issued Williams confidently believed that his intestate's estate would be amply sufficient to satisfy all his creditors. In November, 1839, John W. Benedict et al., obtained a judgment against the said administrator in the District Court of the United States for the State of Mississippi, for a debt due them by the intestate. The administrator having then discovered that the estate would not be sufficient to pay the debts of the deceased, suggested its insolvency to the probate court on the first Monday of December following, and the estate was adjudged insolvent and commissioners were appointed to re-

ceive and audit the claims against the estate. An execution having been issued on the Benedict judgment, and a levy made thereunder on the property of the estate, the administrator brought an action to enjoin the execution of the writ. A statute of Mississippi provided that when a decedent's estate was insolvent, the estate should be distributed proportionately among the creditors. Provision was made for the sale of the property, and commissioners were appointed to receive and examine all claims against the estate. It was also provided that no execution should issue on any judgment obtained against such insolvent estate, but the judgment should be filed as a lien against the estate.

The court held that the lien of a judgment obtained before the death of a decedent could not be effected by a declaration of insolvency subsequently made by an administrator of said decedent, but the court, on page 111, said:

"But, if at the time of the death, the fund from which each of the creditors has an equal right to claim satisfaction is insufficient to pay all, equity requires that one should not be permitted, by a mere race of diligence, to seize satisfaction of his whole debt at the expense of another. Hence, a declaration of insolvency must relate back to the death, in order that this equitable principle may have its effect."

It was also held that an administrator could report an estate as insolvent after nine months, although he could not be sued after nine months. And the court further said:

"As, therefore, the judgment obtained by the plaintiffs

in the court below did not entitle them to a prior lien, or a right of satisfaction in preference to the other creditors of the insolvent estate, they have no right to take in execution the property of the deceased which the probate court has ordered to be sold for the purpose of an equal distribution among all the creditors. The jurisdiction of that court has attached to the assets; they are in gremio legis, and if the marshal were permitted to seize them under an execution, it would not only cause manifest injustice to be done to the rights of others, but be the occasion of an unpleasant conflict between courts of separate and independent jurisdiction."

To the same effect is Byers vs. McAuley, 149 U. S. 608.

In that case the court held that an estate which is in course of administration in a probate court is in gremio legis, and a federal court has no jurisdiction on the filing of a bill by a citizen of another state against the administrator to recover a share in the property, to take the administration of the estate out of the state court, and itself make a decree of distribution determining the rights of citizens of the same state as between themselves. Its jurisdiction in such cases is limited to determining and awarding the shares of citizens of other states.

In the opinion the question is elaborately discussed by Justice Brewer, who delivered the opinion in Cady vs. Bard, 21 Ks. 667, and the reasoning is that the probate court had jurisdiction of the estate and control of the administrator,

and was subject to the orders of the probate court, and no other court, and that an interference by any other court with the administration of such estate would be a plain violation of the law creating such probate court, and defining its jurisdiction.

See also,

Ex parte Chetwood, 165 U. S. 443.

"Thus it will be seen, that under the decisions of this court a foreign creditor may establish his debt in the courts of the United States against representatives of a decedent, notwithstanding the local laws relative to the administration and settlement of insolvent estates, and that the court will interpose to arrest the distribution of any surplus among the heirs."

Green's Admr. vs. Creighton, 23 How. 107-108.

But in order to get satisfaction of said judgment it must be filed in and paid by order of the probate court.

Yonley vs. Lavender, 21 Wall. 276.

Heidritter vs. Oil Cloth Co., 112 U. S. 294.

We claim that under the authorities, which are numerous and uniform, the property of a dead man cannot be attached, and it can make no difference whether the dead man, or his executor or administrator, resided, or resides, outside of the state.

McComb vs. Dunch, Exr., 2 Dall. (Pa.) 73.

Pringle vs. Bracks, Exr., 2 Dall. (Pa.) 97.

Stanton vs. Holmes, 4 Day (Conn.) 96.

Bryant vs. Fussell, 11 R. I., 1, 286.

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Patterson vs. McLaughlin, Cr. C. C., 352, 356.

Redhead vs. Welton, 39 Beav. 521.

Matthey, Admr. vs. Williams, 24 L. J. C., p. 210.

"Foreign attachament does not lie in this state against an executor for a debt due from his testator, for the reason that it would interfere with our statute regulating the distributing of the estates of decedents. It would enable the attaching creditor to disturb the order of the payment of debts, prescribed by law (2 D. 13; 2 D. 97; 15 S. & R 173; 4 Bin. 381.) Aside from authority the case is too clear upon principle to need illustration."

Williamson vs. Beek, 8 Phil. 269.

"Property found in our state belonging to the succession of one who has died abroad and left no heirs here, is a vacant estate, and must be administered upon by a curator, and when a creditor wishes to be paid out of it he should obtain letters of curatorship.

"Decisions of one of our sister states, under laws nearly similar to our own, are in conformity with the ideas we have uniformily expressed on this subject. (See 2 Dallis 73 and 79.)

"The court of probates, it appears to us, had exclusive jurisdiction of this case, and an attorney appointed in the court below could not by an informality in pleading give jurisdiction when the whole proceedings were coram non judice."

Debuys vs. Yerby, Ex., 6 Martin 554; 1 Mart. N. S. 380.

"I am satisfied that the warrant of attachment was unauthorized, and hence was properly vacated. Even if the plaintiff had a cause of action in this state against the defendants as executors of Matthew Clark, deceased, the attachment was unauthorized. Proceedings against them to obtain an application of the property of the estate to the payment of the debts of the testator must be taken and conducted in the same way as if letters testamentary were granted to executors in this state.

"Letters ancillary or auxiliary may be granted here in the case of foreign executors when administration here becomes necessary. But in no case is a warrant of attachment authorized against executors. The property of the estate is trust property in their hands and must be dealt with as such for the benefit of all having an interest in it. Proceedings by attachment are proceedings at law for the benefit of the individual claimant. An injunction may perhaps issue in some cases against foreign executors or administrators with a view to the preservation of trust property, but the action then must be in equity, involving some unjust and unlawful proceeding in regard to it on the part of the executors or administrators.

"Proceedings in attachment are clearly inapplicable for the purpose of compelling the settlement of the estate of a deceased person or of enforcing payment by the executor of an individual demand contracted by the deceased, without charging the executors with any breach of duty, except a neglect to pay the debt."

Metcalf vs. Clark, 41 Barb. 47-48.

As we have already shown, the Kansas statutes recognize the rights of foreign executors in that state, and after the foreign executor has filed an authenticated copy of the will, and of the order of the foreign court appointing him executor, in the probate court in any county in Kansas in which there may be any real estate of the deceased, and the same has been recorded in the office of said probate court, as was done in this case, such probate court has jurisdiction over such estate, and such foreign executor, to the exclusion of the district court. (Secs. 144 and 174, Executors' and Administrators' Act; Secs. 24, 28, Wills' Act.)

To avoid the force of the statutes that we refer to the defendant in error (Brief p. 40), asserts that the plaintiff in error "while failing to have administration upon the Kansas property, complains that the laws of such state do not protect him while remaining out of that state and refusing to submit himself to the jurisdiction of its courts."

This is making a record by assertion. There is nothing in the record to justify the statement that the plaintiff in error failed to have administration upon the Kansas property or refused to submit himself to its courts, but the record shows to the contrary. The petition of the defendant in error alleges the death of George Manley, testate, and the naming of Reuben M. Manley and William H. Risk, as his executors, the probate of the will before the surrogate of the Orphans' Court of Union County, New Jersey, the granting of letters testamentary to William H. Risk, one of

said executors, the qualification of said Risk as such executor and that "thereon and thereby said William H. Risk, as such executor of said estate, became seized and possessed of all the property of the late George Manley, now deceased, lying and being situate in the State of Kansas." (Transcript of Record, p. 6.) And the return of the sheriff on the order of attachment issued herein shows that the property in controversy was levied upon and attached "as the property of said defendant, William H. Risk, executor of the estate of George Manley, deceased." (Transcript of Record, p. 17.)

Section 11 of the Executors' and Administrators' Act, supra, provides that no executor named in a will shall, before letters testamentary are granted, have any power to dispose of any part of the estate of the testator, and section 29 of the Wills' Act provides that no will shall be effectual to pass real or personal estate, unless it shall have been duly admitted to probate.

Even conceding the truth of the assertion of the defendant in error, is he not estopped by reason of his having attached the property in controversy herein, as the property of the plaintiff in error? Can he claim that it is the property of the plaintiff in error when he wants to attach it, and afterwards claim that it is a vacant estate when the plaintiff in error questions his right to attach it? We think not. As far as record shows, the property in controversy must be considered as the property of the plaintiff in error, and it must be presumed that the will of George Manley

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was either admitted to probate or recorded as required by section 29 of the Wills' act. The estate was there, and it was in the custody of the Atchison County Probate Court and, therefore, not subject to an attachment writ from any other courts. And, as we have said, ample authority existed for the appointment of an executor by the Atchison Probate Court to take charge of it.

The failure of an executor to qualify, only affects his right to act and to sue, and his want of power or title could only be taken advantage of by answer or by way of abatement, and such a disability could be cured pendente lite.

Smith vs. Peckham, 39 Wis. 414.

And the failure to qualify in Kansas would cause a like disability to be sued.

Galoway vs. Joyce, 1 Black 372.

"But while it is true that he (an executor) cannot maintain an action before probate, he may begin suit and proceed in it to that point where the production of probate becomes necessary; and it will be sufficient if he obtains the probate in time for that exigency. * * * Hence in most states it may be said that a subsequent grant of letters testamentary or of administration relates back and renders valid all acts which come within the scope of a rightful executor's or administrator's authority."

7 Am. & Eng. Enc. L. (1st Ed.), pp. 192-193. (Text.)

As a general rule an executor may do, before probate,

all acts pertaining to his office which do not require him to establish his title affirmatively.

7 Am. & Eng. Enc. L. (1st Ed.), p. 231, (1st col. notes).

In this case, by relation, the executor is considered to have qualified in Kansas as soon as he could have qualified there, which was immediately upon his qualifying in New Jersey, for the law knows no interval of time between the testator's death and the vesting of right and title in the executor.

Whitehead vs. Taylor, 10 Ad. & El. 212.

Brooks vs. McComb, 38 Fed. 317, (Decided March 25, 1889, by Judge C. G. Foster).

"The title of an executor to the estate of the decedent is derived solely from the will, and vests in him from the moment of the testator's death; that of an administrator is derived wholly from the grant of letters of administration, and becomes vested only from the time of the grant."

7 Am. & Eng. Enc. L. (1st Ed.), 230, par. 7.

In Keith vs. Guthrie, 59 Ks. 200, 201, it was expressly held that in matters pertaining to the distribution of a decedent's estate the probate court has exclusive jurisdiction subject to an appeal to the district court.

This is entirely inconsistent with the claim that an attachment may issue from the district court, and that a dead man's property may be seized thereon so that a single creditor may appropriate the whole estate to his own use.

In Wickham vs. Hall, 60 Fed. (Iowa), 326, 330, it is

held, (Shiras, J.), that a judgment against the personal representative of an estate "creates no lien upon the property of the estate, nor does it authorize the levy of an execution for its enforcement. The judgment simply determines the extent of a claim against the estate, and adjudges the amount thereof, but the debt thus established must take its place and share of the estate as administered by the probate court, and it cannot be enforced by process directly against the property of the decedent." (Citing Byers vs. McAuley, 149 U. S. 620, supra.)

THIRD: SEC. 203 OF THE EXECUTORS' AND ADMINISTRATORS' ACT (Par. 2989, G. S. Ks. 1889), AS CONSTRUED AND UPHELD IN THIS CASE, IS IN VIOLATION OF SEC. 2, ART. 4, CONSTITUTION OF THE UNITED STATES, IN THAT IT DOES NOT ACCORD TO THE PLAINTIFF IN ERROR AND HIS PREDECESSOR, CITIZENS OF THE STATE OF NEW JERSEY, ALL THE PRIVILEGES AND IMMUNITIES OF AN EXECUTOR RESIDENT IN THE STATE OF KANSAS. (Sec. 2, Art. 4, Const. U. S.)

FOURTH: SEC. 203 OF THE EXECUTORS' AND ADMINISTRATORS' ACT (Par. 2989, G. S. Ks. 1889), AS CONSTRUED AND UPHELD IN THIS CASE, IS IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, IN THAT IT ABRIDGES THE PRIVILEGES OF THE PLAINTIFF IN ERROR AND HIS PREDECESSOR, CITIZENS OF THE

UNITED STATES, AND THEIR IMMUNITY FROM SUIT BY ATTACHMENT, AND DEPRIVES THEM OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW, AND DENIES THEM THE EQUAL PROTECTION OF THE LAWS.

FIFTH: TH RIGHT OF THE PLAINTIFF IN ERROR, AND HIS PREDECESSOR, CITIZENS OF THE STATE OF NEW JERSEY, TO ACT AS EXECUTORS OF THE ESTATE OF GEORGE MANLEY, DECEASED, IS A PRIVILEGE, AND THE EXEMPTION OF AN EXECUTOR, NOT A RESIDENT IN THE STATE OF KANSAS, FROM SUITS BY ATTACHMENT, IS AN IMMUNITY, WHICH IS GUARANTEED BY SEC. 2, ART. 4, CONSTITUTION UNITED STATES, AND THE SAME WERE DENIED BY THE DECISION OF THE SUPREME COURT OF KANSAS IN THIS CASE.

These points may be ~~remembered~~ considered together.

One of the privileges of a non-resident citizen is the right to institute an action in the courts, where a citizen of the state in which the suit is to be brought could maintain such an action, and one of the immunities of the non-resident citizen is the exemption from a suit where a citizen of the state would be exempted from such a suit. Such being the case the foreign executor in this case cannot be sued at law, by attachment in the Kansas courts, and the estate that is confided to his charge cannot be removed from the jurisdiction of the Probate Court of Atchison

County, Kansas, and administered by the Atchison county District Court, for the reason that the foreign executor would not be liable to such a suit if he were a resident of the State of Kansas.

We have not been furnished by this court with any definite or exact definition or declaration of what constitutes the privileges and immunities of the citizens of the several states that are guaranteed by the federal constitution. This court has uniformly refused to define those rights or to determine them except as necessary in the particular case before it. We think, however, that it has been sufficiently determined by the adjudged cases that the right to sue and be sued in the courts of the states is one of the privileges protected by the federal constitution, and that a non-resident can sue in any case where a resident of the state can sue. We also think that the right to be named as an executor in the last will and testament of a dead man is a property right and privilege of general citizenship, and is protected by the federal constitution, and that a non-resident executor has the same right of action and the same immunity from suit that he would have if he were a resident and citizen of the state where the suit was brought.

In Corfield vs. Coryell, 4 Wash. (C. C.), 371, 380, these "privileges and immunities" are stated to be the right to take, hold, and dispose of property, either real or personal, and an exemption from higher taxes or impositions than are paid by other citizens of the state.

This is repeated in Campbell vs. Morris, 3 Har. &

McH. (Md.) 554, with the additional remark that such property shall be protected and secured by the laws of the state in the same manner as the property of citizens of the state is protected.

In Blake vs. McClung, 172 U. S. 239, it was held that while a state might, through judicial proceedings, take possession of the assets of an insolvent foreign corporation within its limits and distribute them among creditors, still it could not, under the constitution of the United States, deny the right of citizens of other states to participate in such distribution on equal terms with its own citizens.

The opinion of the court was delivered by Justice Harlan, and the decision of the Supreme Court of Tennessee (42 S. W. Rep. 53), was reversed, Justice Brewer and Chief Justice Fuller, dissenting.

Justice Harlan, in delivering the opinion of the court, reviewed the former decisions of the court: Conner vs. Elliott, 18 How. 591, where Justice Curtis said that the court had never undertaken to give any exact or comprehensive definition of the words, "privileges and immunities;" Corfield vs. Coryell, 4 Wash. C. C. 371, 380; McGrady vs. Virginia, 94 U. S. 395 (affirming 27 Gratt. 985), where it was held that a state could prohibit the citizens of other states from planting oysters in a river in that state where the tide ebbed and flowed. It was held that this right of fishing was a "common property" of the state, and that "the right which the people of that state thus acquired comes not from their citizenship alone, but from their citizenship and pro-

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perty combined. It is in fact a property right, and not a mere privilege or immunity of citizenship;" Paul vs. Virginia, 8 Wall. 168, 180, where the court observed: "It was undoubtedly the object of the clause in question to place the citizens of each state upon the same footing with citizens of other states, so far as the advantages resulting from citizenship in those states are concerned. It relieves them from the disabilities of alienage in other states; it inhibits discriminating legislation against them by other states; it gives them the right of free ingress into other states, and egress from them; it insures to them in other states the same freedom possessed by the citizens of those states in the acquisition and enjoyment of property, and in the pursuit of happiness; and it secures to them in other states the equal protection of the laws;" Ward vs. Maryland, 12 Wall. 418, 430, where it was held, "that the defendant might lawfully sell, or offer or expose for sale, within the district described in the indictment, any goods which the permanent residents of the state might sell, or offer for sale in that district, without being subjected to any higher tax or excise than that exacted by law of such permanent residents;" Slaughter House Cases, 16 Wall. 36, 77, where the court said: "Its sole purpose was to declare to the several states, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the right of citizens of other states within your jurisdiction," and Cole

vs. Cunningham, 133 U. S. 107, 113, 114. (In this latter case it was held that a decree of the state court restraining citizens of that state from prosecuting attachment suits begun in another state, and brought therein in order to evade the laws of the first state, did not violate the constitutional provision referred to above, but in Reynolds vs. Adden, 136 U. S. 348, the contrary was held to be the law where the party restrained was not a resident of the state.)

In the dissenting opinion Justice Brewer said:

"Indeed, aside from the demand made by the statutes of certain states of deposits by foreign corporations to secure home creditors, there are frequent illustrations of discrimination based upon the matter of residence. Often non-resident plaintiffs are required to give security for costs when none is demanded of resident suitors.

"Attachments will lie in the beginning of an action, authorizing the seizure of property upon the ground that the defendant is a non-resident when no such seizure is permitted in case of resident defendants. These and many similar illustrations, which might be suggested, only disclose that it has been accepted as a general truth that a state may discriminate on the ground of residence, and that such discrimination is not to be condemned as one between citizens; and yet, if the doctrine of the opinion of the court in this case be correct, I cannot see how those statutes can be sustained, for surely they discriminate between non-resident suitors in the matter of fundamental rights, to-wit: the

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right of equal entrance into courts, and equal security in the possession of property."

Blake vs. McClung, supra, was followed in Maynard vs. Association, 92 Fed. 435, where a similar Michigan statute was under consideration, and in Sully vs. American National Bank, 178 U. S. 289.

The equal protection of the laws, under the fourteenth amendment, implies not only equal accessibility to the courts for the prevention or the redress of wrongs and the enforcements of rights, but equal exemption with others of the same class from all charges and burdens of every kind.

In re Ah Fong, 3 Shaw. 144.

Ho Ah Kow vs. Numau, 5 Sawy. 552.

In re Tiburcio Parrott, 1 Fed. 481.

In Welton vs. Missouri, 91 U| S. 275, it was held that a statute of Missouri which required the payment of a license tax from persons who dealt in the sale of goods, wares and merchandise which were not the growth, produce or manufacture of the state, and required no such license tax from persons selling in a similar way goods which were the growth, produce or manufacture of the state, was in conflict with the power vested in congress to regulate commerce with foreign nations and among the several states.

In People vs. City of Detroit, 70 Mich. 534, it was held that Pub. Acts 1887, No. 313, Sec. 8, refusing to liquor sellers the right to become surety on the bond required by the act, was in violation of both the state constitutional provision which secured to every person his liberty and property

and Canst. U. S. Amend. 14, prohibiting any law which abridged the privileges or immunities of citizens.

In Saunders vs. Venning, 38 S. C. 502, it was held that 19 Stats. at Large, p. 937, exempting Berkley county from the operation of the general stock law, with a proviso that the act should not affect those citizens of the county who had conformed to the general stock law, is unconstitutional, the proviso being a special law applying to certain persons of a class, and repugnant to Const. Sec. 12, Art. 1, which declares that no person shall be subjected in law to any restraint in regard to his personal rights not laid on others under like circumstances.

In Central Loan & Trust Company vs. Campbell Com. Co., 173 U. S. 84, reversing 49 Pac. Rep. (Okl.) 48, it was held that a statute which requires the plaintiff to give a bond as a prerepuisite to the issuance of an attachment against a resident, but requires no bond where the attachment is against property of a non-resident, does not operate as a denial of due process of law or of the equal protection of the laws (Sec. 2, Art. 4, not cited.)

The decision was put on the ground that the state, for the purpose of attachment, has a right to classify residents in one class and non-residents in another, which point was conceded by counsel.

In Conner vs. Elliott, 18 How. 591, supra, it was held that the privileges and immunities secured to the citizens of each state, by the first clause of the second section of the

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fourth article of the constitution were only those which belong to citizenship.

That the community of gains between married persons given by the law of Louisiana, when the marriage is contracted within the state, or contracted out of the state and the parties afterwards go to Louisiana, did not extend by virtue of the constitution, providing that the citizens of each state shall be entitled to all the privileges and immunities of the citizens of the several states, so as to apply to a native citizen of Louisiana who was married while under age in the State of Mississippi, and resided there, together with her husband, during the continuation of the marriage.

In that case the court said (p. 593):

"It is sufficient for this case to say that according to the express words and clear meaning of this clause (Const. U. S., Art. 4, Sec. 2), no privileges are secured by it, except those which belong to citizenship. Rights attached by the law to contracts by reason of the place where such contracts are made or executed, wholly irrespective of citizenship of the parties to those contracts, cannot be deemed 'privileges of a citizen,' within the meaning of the constitution.

"Of that character are the rights now in question. They are incidents ingrafted by the law of the state on the contract of marriage. And in obedience to that principle of universal jurisprudence which requires a contract to be governed by the law of the place where it is made and is to be

performed, the law of Louisiana undertakes to control these incidents of a contract of marriage made within the state by persons domiciled there, but leaves such contracts made elsewhere, to be governed by the laws of the places where they may be entered into. In this there is no departure from any sound principle and there can be no just cause of complaint."

And again on page 594:

"Whether persons contracting marriage in Louisiana are citizens of that state or some other state, or aliens, the law equally applies to their contract; and so whether persons married and domiciled elsewhere be or be not citizens or aliens, the law fails to regulate their rights. The law does not discriminate between citizens of the state and other persons; it discriminates between contracts only. Such discrimination has no connection with the clause in the constitution now in question."

In Scott vs. Sanford, 19 How. 393, it was held that the provision entitling citizens of each state to all the privileges and immunities of citizens of the several states did not apply to a person who, in the state from which he comes, was endowed with certain rights of citizenship which are not given him in the other state, since, when the domicile is permanently changed, it is the province of the state to determine the status of its citizens and inhabitants.

In Paul vs. Virginia, 8 Wall. 168, supra, it was held that the privileges and immunities secured to citizens of each state in the several states by this clause, were those

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privileges and immunities which are common to the citizens in the latter states, under the constitution and laws of each, by virtue of their being citizens. Special privileges enjoyed by citizens in their own state, were not secured by it in other states.

That the clause relieved them from the disabilities of alienage of other states. It inhibited discriminating legislation against them; it gave them the right of free ingress and egress; it insured freedom in the acquisition and enjoyment of property.

In that case the court said (p. 180):

"But the privileges and immunities secured to the citizens of each state in the several states, by the provision in question, are those privileges and immunities which are common to the citizens in the latter states under their constitution and laws by virtue of their being citizens. Special privileges enjoyed by citizens in their own states are not secured in other states by this provision. It was not intended by the provision to give the laws of one state any operation in other states."

And in Slaughter House Cases, 16 Wall. 79, supra, it is said that the privileges of a citizen of the United States are, inter alia, the right of a citizen of this great country to come to the seat of government to assert any claim he may have upon that government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions, the right of free access to its seaports, through which all operations

of foreign commerce are conducted, to the subtreasuries, land offices, and courts of justice, in the several states.

In Ward vs. Maryland, 12 Wall. 418, supra, a statute of Maryland required all traders resident within the state to take out a license and pay therefor certain sums regulated by a sliding scale from $102.00 to $150.00, according as their stock in trade might vary from $1,000 to more than $4,000. The statute also made it a penal offense for any person, not being a permanent resident of the state, to sell, or expose for sale, within certain limits, within the state, any goods, wares or merchandise whatever, other than agricultural products and articles manufactured in Maryland, within the said limits, without first obtaining a license so to do, for which license (to be renewed annually), a sum of three hundred dollars was to be paid. It was held that this statute imposed a discriminating tax upon non-resident traders, trading in the limits mentioned, and that it was, pro tanto, repugnant to the federal constitution and void.

In Chemung Canal Bank vs. Lowery, 93 U. S. 72, it was held that a state statute of limitations which provided, in effect, that when the defendant is out of the state, the statute of limitations shall not run against the plaintiff, if the latter resides in the state, but shall if he resides out of the state, is not unconstitutional as in violation of the provision that the citizens of each state shall be entitled to all

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the privileges and immunities of citizens in the several states.

The reason given in Chemung Canal Bank vs. Lowery (93 U. S. 77), supra, were: 1. That if the statute did not run as between non-resident creditors and their debtors, it might often happen that a right of action would be extinguished, perhaps for years, in the state where the parties reside, and yet if the defendant should be found in Wisconsin, a suit could be sprung upon him after the claim had been forgotten, and the laws of Wisconsin would thus be used as a trap to catch the unwary defendant, after the laws which had always governed the case had barred any recovery. 2. That a personal obligation is due at the domicile of the obligor. It is the duty of the debtor to seek the creditor and pay him his debt at the residence of the latter. Not doing this he is guilty of lanches against the law of the creditor's domicile, as well as his own, but he evades this law by absenting himself from the jurisdiction. As long as he does that the statute of limitations of that jurisdiction ought not to run to the creditor's prejudice.

In McCready vs. Virginia, 94 U. S. 395, the court said:

"We think we may safely hold that the citizens of one state are not invested by this clause of the constitution with any interest in the common property of the citizens of another state. If Virginia had provided by law for the sale of its own vast public domain and a division of the proceeds among its own people, no one, we venture to say, would contend that the citizens of other states had a constitutional

right to the enjoyment of this privilege of Virginia citizenship, and the reason is obvious: the right thus granted is not a privilege or immunity of general, but of special citizenship. It does not belong of right to citizens of all free governments, but only to the citizens of Virginia on account of the particular circumstances in which they are placed."

In Booth vs. Lloyd, 33 Fed. 593, it was held that the Maryland act of 1884, Sec. 518, prohibiting the use of vessels to buy oysters on the Chesapeake bay unless a license was obtained from the state therefor, conditioned upon a twelve months residence in the state, and the payment of a tonage fee, was unconstitutional, as denying citizens of other states privileges enjoyed by those of Maryland.

In Shirk vs. City of Lafayette, 52 Fed. 857, it was held that Rev. St. Ind., Sec. 2988, which provides that it shall be unlawful for any person, association or corporation to appoint a non-resident a trustee in a deed, mortgage or other instrument in writing, except wills, for any purpose whatever, is in conflict with the constitution of the United States, Art. 4, Sec. 2, which provides that citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states.

Cases cited in the opinion, Bryant vs. Richardson, 126 Ind. 145 (25 N. E. Rep. 807); Robey vs. Smith, 131 Ind. 342; Farmers Loan & Trust Co. vs. Ry. Co., 27 Fed, 146,

In the latter case Gresham, J., held that a citizen of the United States has a right to hold real and personal property, absolutely, or in trust for his own benefit, or in trust

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for the benefit of himself and others, in any state in the Union.

In Frazer vs. M. & T. Co., 82 Fed. Rep. 257, it was held that the act of Pennsylvania of June 5, 1897, imposing on every employer of foreign born unnaturalized male persons over the age of 21 years, a tax of three cents a day for each day that each of such persons may be employed, was unconstitutional.

In Holden vs. Hardy, 46 P. R. (Utah), 759, (1st col.), it was held (citing Slaughter House Cases, 16 Wall. 76), that the constitutional provision did not create the "privileges and immunities" referred to, and "threw around them in that clause no security for the citizen of the state in which they were claimed and exercised. Its sole purpose was to declare to the several states that whatever those rights as you grant or establish them to your own citizens, or as you limit or qualify or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of the citizens of other states within your jurisdiction."

In Steed vs. Harvey, 18 Utah 367, the court said:

"He is entitled to the same protection of life, liberty and property, the laws of such state extend to its own citizens. The privileges and immunities of a citizen of one state include these rights with others. There are privileges, however, which states give only to their own citizens, rights which they will not permit citizens of other states to acquire and possess, such as the election franchise, the

right to sit upon juries and the right to hold public office. These rights they make dependent on citizenship. If the sovereignty were to entrust the elective franchise to the citizens of another only in part, it would not rest upon the will of its own citizens; or if a state were to permit its offices to be filled, and their functions to be exercised, by citizens of other states, its citizens, to that extent, would not enjoy the right of self-government.

In In re Stanford Estate, 126 Cal. 112, it was held that under the Const. U. S. Art. 4, Sec. 2, providing that the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states, and Rev. St. U. S. Sec. 1978, providing that all citizens of the United States shall have the same right in every state as is enjoyed by them while citizens thereof to inherit property, the provisions of the collateral inheritance tax law (Act March 23, 1893, as amended by Sec. 897, p. 77), making a distinction between resident and non-resident relatives, and excluding non-resident relatives from its exceptions, was invalid.

In Black vs. Seal, 6 Houst. (Del.) 541, it was held that the discrimination in the Delaware statute between a citizen residing in the state and a non-resident in regard to issuing a writ of capias ad respondendum against them, the statute requiring in the former an affidavit of fraud previously filed, but none as to the latter, is in conflict with Const. U. S., Art. 4, Sec. 2, and amendment Art. 14, Sec. 1.

In Caldwell vs. Armour, 1 Pennewill, 545, it was

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held that the laws of Del. c. 192, Sec. 1, providing that a summons in an action may be served on a non-resident doing business in the state by branch establishment or agency, by leaving a copy thereof with the agent or at the usual place of business of the non-resident, was repugnant to Const. U. S., Art. 4, Sec. 2.

In Douglas vs. Stephens, 1 Del. Ch. 465, it was held that the statute (1 Del. laws, p. 81), giving preference to creditors within the state by providing that no foreign debt shall be paid by an executor or administrator until the debts due the inhabitants of the state be first secured and paid, conflicted with Const. U. S., Art. 4, Sec. 2, which provides "that a citizen of each state shall be entitled to all the privileges and immunities of the citizens of the several states."

In In re Opinion Supreme Court, 25 N. H. (5 Fost.) 537, it was held that an act providing that all conveyances, mortgages, etc., which either in whole or in part shall have been for, or on account of, spirituous or intoxicating liquors, should be utterly null and void, against all persons and in all cases, and that no action of any kind should be maintained, either in whole or in part, for intoxicating liquors sold in any other state or country, was obnoxious to Const. U. S. Art. 4, Sec. 2, for it assumed to deprive the citizens of other states of rights of action to redress injuries to property.

In Davis vs. Pierce, 7 Minn. (3 Gil.) 13, (82 Am. Dec. 65), it was held that act of Feb. 14, 1862, suspending the

privileges of all persons aiding in the Rebellion of prosecuting and defending actions and judicial proceedings, in so far as it applied to citizens of other states, was in violation of Const. U. S. Art. 4, Sec. 2.

In In re Courts for Trial of Infants, 14 Pa. Co. Ct. Rep. 254, (Am. Dig. 1894, p. 735, Sec. 141), it was held that act of June 12, 1893, providing that infants under 16 years of age should be confined and tried separately from other criminals, conflicts with the provision of the constitution, which declares that all courts shall be open, and that all laws relating to the courts shall be general and of uniform operation.

In State vs. Duckworth, 51 Pac. Rep. (Idaho), 458, 459, a statute of Idaho declared it to be unlawful to bring sheep into that state without first having them "dipped," as provided in said act, and it was held that the habitat of "scab" in sheep was not confined to any one state, but that sheep had "scab" in Idaho, and that to require sheep to be "dipped" before being brought into the state was an unjust discrimination against outside sheep, and the court said:

"The burden placed upon the shipper or driver of sheep would be very great if, arriving at the state line, he must notify a sheep inspector, and, in case such inspector pronounced the sheep sound and healthy, they must be 'dipped' once before entering such state. Under the guise of inspection and quarantine, said sections place unnecessary burdens and restrictions upon bringing sheep into this state for any purpose whatever, or transporting them through

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the state to the markets of the East, and make unnecessary and prejudicial discriminations against sheep whose owners may desire to bring them into the state; and they are repugnant to the provisions of the federal constitution. (Commerce clause and Art. 4, Sec. 2.)"

In State of Minnesota vs. Barber, 136 U. S. 313, a statute was declared invalid which required dressed meat to be inspected 24 hours before it was offered for sale.

In State vs. Wiggin, 64 N. H. 508, it was held that Gen. Laws N. H. c. 119, Sec. 9, as amended by Laws 1879, c. 34, which fixed the price of licenses to sell and put up lightning rods at $100 to citizens of that state, and $500 to citizens of other states, did not give the citizens of other states all the privileges and immunities of citizens of that state.

In Rush vs. Holliway, 20 Rep. (Ky.) 9, a Kentucky statute pronounced void all contracts made by peddlers without a license. Subsequently an amendatory act was passed relieving from its operation citizens of the state, and it was held that such amendatory act was void, as discriminating against citizens of other states.

In Sprague vs. Fletcher, 69 Vt. 69, it was held that a Vermont statute which allowed residents only to deduct their debts from their personal tax returns was unconstitutional.

In Marsh vs. Steele, 9 Neb. 96 (1 N. W. Rep. 896), it was held that the Code Civ. Proc., Sec. 200, which required an undertaking to be given in attachment in all cases, ex-

cept where the ground of the attachment was that defendant was a non-resident of the state, was not in violation of Const. U. S. Art. 4, Sec. 2. That constitutional provision must be confined to those privileges and immunities which are fundamental in their nature.

In Eingartner vs. Illinois Steel Co., 94 Wis. 70 and Cafrode vs. Gartner, 79 Mich. 332, it was held that a non-resident could maintain an action, in any case where a resident could maintain an action, and that the fact that both the plaintiff and defendant were non-residents of the state, and the action could be maintained at the domicile of both of the parties to the suit, gave the court no right or discretion to dismiss the action.

In Kimmish vs. Ball, 129 U. S. 127, it was held that the provision of the Iowa Code (Sec. 4059), that any one who had in his possession in the state, any Texas cattle which had been wintered north of the southern boundary of Missouri or Kansas should be liable for any damages that might accrue from allowing them to run at large, and so spreading Texas fever, did not deny to citizens of other states any rights and privileges accorded to citizens of Iowa. That the act prohibited everyone, whether citizens of Iowa or not, from bringing into or having diseased cattle in the state.

In Leisy vs. Hardin, 135 U. S. 100, the court said of Const. U. S., Art. 4, Sec. 2, that the "privileges and immunities thus secured are those fundamental rights and privileges which appertain to citizenship."

In Ex parte Lockwood, 154 U. S. 116, it was held that it was for the determination of the Virginia courts alone, to say who should practice law in that state, and the right to practice law was not such a privilege or immunity of a citizen of the United States as is guaranteed by the 14th amendment.

In Gulf C. & S. F. Ry. Co. vs. Ellis, 165 U. S. 150, it was held that act, Texas, April 5, 1889, providing that railroad companies failing to pay claims less than $50 for labor, damages, overcharges on freight or for stock killed, within 30 days after presentation thereof, should be liable for an attorney's fee not exceeding $10, was void, as depriving such companies of the equal protection of the laws.

In Slaughter House Cases, 16 Wall. 36, it was held that the privileges and immunities of citizens of the United States referred to in the second clause of the Fourteenth Amendment of the U. S. Constitution were those which arose out of the nature and essential character of the national government, the provisions of its Constitution, or its laws and treaties, made in pursuance thereof.

In U. S. vs. Cruikshank, 92 U. S. 543, it was held that the Fourteenth Amendment added nothing to the rights of one citizen as against another. It simply furnished an additional guaranty against any encroachment by the states upon the fundamental rights which belong to every citizen as a member of society.

In Iowa Central Ry. Co. vs. Iowa, 106 U. S. 389, it was held that it is not a right, privilege or immunity of a

citizen of the United States, within the meaning of Constitution Amendment 14, to have a controversy in the state prosecuted or determined by one form of action rather than by another.

In Magoun vs. Illinois Trust & Savings Bank, 170 U. S. 283, it is said:

"The provision of the fourteenth amendment forbidding the states to deny to any person within their jurisdiction the equal protection of the laws, does not require that the law shall have equality of operation, in the sense of an indiscriminate operation on persons merely as such, but on persons according to their relation. It does not prevent the states from distinguishing, selecting and classifying objects of legislation, within a wide range of discretion; but a classification must be based upon some reasonable ground, some difference which bears a just and proper relation to the classification, and not a mere arbitrary selection."

In Tinsley vs. Anderson, 171 U. S. 101, it was said:

"The right to the equal protection of the laws is not denied by a state court where the same course of procedure applied to the person in question would have been applied to any other person in the same state under similar circumstances."

In Lemmon vs. The People, 20 N. Y. 262, 608, Justice Denio, in delivering the opinion of the court, said:

"The language (of Sec. 2, Art. 4., Const. U. S.), is that they shall have the privileges and immunities of citizens in the several states. In my opinion the meaning is, that in a

given state, every citizen of every other state shall have the same privileges and immunities—that is, the same rights—which the citizens of that state possess. In the first place, they are not to be subjected to any of the disabilities of alienage. They can hold property by the same titles by which every other citizen may hold it, and by no other. Again, any discriminating legislation which would place them in a worse situation than a proper citizen of the particular state, would be unlawful."

In Magill vs. Brown, Brightly N. P. 346 (16 Fed. Cas. 408; Case No. 8952), it was held that one of the privileges secured in every state to the citizens of the several states by Art. 4, Sec. 2, of the Constitution of the United States, is that of exemption from the law of alienage and the consequent right of enjoying property in the several states; and accordingly, a devise or bequest cannot be defeated on the ground that the beneficiary is a citizen or a corporation of another state than the testator.

In Fecheimer vs. City of Louisville, 84 Ky. 306, it was held that an ordinance of the City of Louisville imposing a higher tax on the business of a merchant of another state than that of a resident of the city, was in violation of Sec. 2, Art. 4, Constitution of the United States, and void.

In Gallup vs. Schmidt, 183 U. S. 300, it was held that a non-resident executor is not denied any rights and privileges secured to him by the Constitution of the United States because Ind. Rev. Stats., Sec. 8560, under which omitted property belonging to the estate was added to the

tax duplicate by the county auditor, contains no provision for notice to any person not a resident of the county in which such omitted property is proposed to be assessed, where he not only had an opportunity to appear and set up any defense that he had, but actually did appear, and after his demurrer and motion to dismiss had been overruled, answered and was fully heard in the trial court, and his objections to the findings and rulings of that court have been heard and considered by the Supreme Court of the state.

In Douglass vs. Stephens, 1 Del. Ch. 465 (decided in 1821), a statute of Delaware was under consideration which discriminated in favor of resident creditors of a dead man, Chancellor Ridgely, in that case said (page 473):

"The difficulty is to discover in what instance any privilege or immunity of a citizen of one state may be abridged in another. He may purchase and hold lands by any of the several modes by which real estate may be acquired. He may take by descent, where the title is vested in him by the operation of law. He may obtain goods and chattels, in all the forms and varieties peculiar to personal property. He may be an executor, administrator, or witness. He may prosecute every species of suit both in law or in equity, and in short, as to every civil right, I know no difference between him and a citizen of the state."

And again (page 474):

"The only reasonable construction to be given to this clause (Sec. 2, Art. 4, Const. U. S.), is that of placing all

citizens of the United States on the same footing, and extending to them a perfect equality in their rights, privileges and immunities. If one citizen has a privilege to which others are not entitled, then they are not entitled to all the privileges and immunities of citizens in the several states."

From the cases cited above it is apparent that the "privileges and immunities" of the citizen, guaranteed by the federal constitution, are those which belong to citizenship. (Conner vs. Elliott, 18 How. 591, 593.) That they are those fundamental rights and privileges which appertain to citizenship, (Leisy vs. Hardin, 135 U. S. 100), and which are common to the citizens in the latter states, under the constitution and laws of each, by virtue of their being citizens, (Paul vs. Virginia, 8 Wall. 168). That of the Const. U. S., Art. 4, Sec. 2, "its sole purpose was to declare to the several states, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of the citizens of other states within your jurisdiction." (Slaughter House Caset, 16 Wall. 36, 37; Holden vs. Hardy, 46 R. P. (Utah) 759; Steed vs. Harvey, 54 P. R. (Utah) 1011, 1012). That it placed the citizens of each state upon the same footing with the citizens of the other states, so far as the advantages resulting from citizenship in those states is concerned, and relieved them from the disabilities of alienage in other states; that it inhibited discriminating legislation against them by other states, and

insured to them the same freedom possessed by the citizens of those states, in the acquisition and enjoyment of property, and the equal protection of the laws, (Paul vs. Virginia, 8 Wall. 168, 180).

That the fourteenth amendment Const. U. S., added nothing to the rights of one citizen against another, but simply furnished an additional guaranty against any encroachment by the states upon the fundamental rights which belong to every citizen as a member of society, (U. S. vs. Cruikshank, 92 U. S. 543). That the equal protection of the laws is given where the same course of procedure is applied to the person in question, as would have been applied to any other person in the same state under similar circumstances, (Tinsley vs. Anderson, 171 U. S. 101), and it implies not only equal accessibility to the courts for the prevention or the redress of wrongs and the enforcement of rights, but equal exemption with others of the same class from all charges and burdens of every kind, (In re Ah Fong, 3 Sawy. 144; Ho Ah Kow vs. Numan, Sawy. 552; In re Tiburcio Parrott, 1 Fed. 481).

One of these "fundamental rights of citizenship" is the right to take, hold and enjoy property (Corfield vs. Coryell, Wash. (C. C.) 371, Paul vs. Virginia, 8 Wall. 168; Blake vs. McClung, 172 U. S. 314), and such right must be protected and secured by the laws of the state in the same manner as the property of the citizens of the state is protected, Campbell vs. Morris, 3 Har. & McH. (Md.) 554; Blake vs. McClung, 172 U. S. 314).

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Our examination of the authorities has failed to disclose a single case decided by this court where a state statute has been upheld which discriminated against a non-resident in his right of access to the courts of the state, or his right to take, hold and enjoy property.

In Conner vs. Elliott, 18 How. 591, the property right in dispute was the community of gains between married persons given by law of the state where the marriage was contracted—community property. The court held in that case that the right to such community property was a right which was attached to the contract of marriage by the lex loci contractus, irrespective of the citizenship of the parties, and that the state law did not discriminate between citizens of the state and other persons, but discriminated between contracts only.

In McCready vs. Virginia, 94 U. S. 395, the property right in dispute was the right of common of fishery (the planting of oyster beds), in the tide waters of Virginia—"common property" of the state. But in Booth vs. Lloyd, 35 Fed. 593, a fundamental right in property was in dispute, and it was there held that a state statute was invalid which prohibited the use of vessels to buy oysters in the Chesapeake bay, unless a license was obtained so to do, conditioned on a residence of twelve months in the state, and the payment of a tonnage fee. The question in dispute was the right to do business in the state of Maryland.

Chemung Canal Bank vs. Lowery, 93 U. S. 72; Central Loan & Trust Co. vs. Campbell Com. Co., 173 U. S. 346;

and Marsh vs. Steele, 9 Neb. 96, do not involve any fundamental rights of the citizen. In the first case a state statute of limitations was held to be valid that provided that when the defendant was out of the state, the statute should not run against the plaintiff, if the plaintiff resided in the state, but should, if he resided out of the state. In the second case, a state statute which required the plaintiff to give bond as a prerequisite to the issuance of an attachment against a resident, but required no such bond where the attachment was against property of a non-resident, was held not to operate as a denial of due process of law, or of the equal protection of the laws (Const. U. S., Art. 4, Sec. 2, not cited or commented on by the court or counsel). In the third case a state statute was held to be valid which required an undertaking to be given in attachment, in all cases, except where the ground of attachment was that defendant was a non-resident of the state, as it did not deny the non-resident a privilege or immunity which was fundamental in its nature.

Anyone who thinks he sees in any of the above cases a right in the state to discriminate against a non-resident in a fundamental right, merely mistakes the shadow for the substance. The fundamental right in those cases was the right to be heard in court, on equal terms with the resident of the state, and such right is fully protected when the non-resident is given the same right to have his case tried on like evidence and by the same jury or court as a resident of the state would have. All other matters of form which do

not impair the fundamental right, affect merely the remedy and not the right.

To illustrate, take the matter of the sale of real estate for delinquent taxes. Many matters of procedure must be gone through with by the taxing officers, and a failure to perform any of them would avoid a tax deed in the absence of a healing statute, but a compliance with all of these matters of procedure by the taxing officers can be dispensed with or "cured," excepting in the case of three essential requirements, (1) in the assessing of the property for taxes, (2) in the notice that the property will be sold for the delinquent taxes, and, (3) in the notice that a deed will be issued to the tax purchaser unless the property is redeemed, and a compliance with these essentials cannot be dispensed with or "cured" even by a legislative enactment.

The difference between matter of substance and matter of form is forcibly illustrated by the case of Capital Traction Co. vs. Hof., 174 U. S. 1, where it was held that the constitutional right of a trial by jury was not violated by a statute which allowed a trial by jury in the appellate court, but required the appellee, in order to take his appeal, to give bond.

In ex parte Lockwood, 154 U. S. 116, (14 S. C. R. 1082), the question in dispute was the right of Miss Belva A. Lockwood, who had been duly licensed to practice in the courts of the District of Columbia, to practice law in the courts of Virginia. She was denied the right solely because she was a woman, and it was held that whether

women should be admitted to practice law in Virginia was a matter for the determination of the Virginia courts alone, and that the action of the court in refusing her a license did not deny her a privilege of a citizen of the United States, within the meaning of the fourteenth amendment.

The right to practice law is not a fundamental right of citizenship, but is a special privilege granted by the law and the courts, based on requirements as to the learning and good character to be ascertained and determined on examination of the applicant.

Let us turn now to the cases grounded on the fundamental right of a non-resident to sue in the courts, and to take, hold and enjoy property.

The leading case is Blake vs. McClung, 172 U. S. 239, where a statute of the State of Tennessee, which discriminated between residents and non-residents of that state in the distribution of the assets of an insolvent foreign corporation was declared invalid.

In Douglas vs. Stephens, 1 Del. Ch. 465, a state statute which provided that no foreign debt should be paid by any executor or administrator until the debts due the inhabitants of the state were first secured and paid, was declared invalid.

In In re Stanford's Estate, 126 Cal. 112, the collateral inheritance tax law of the state of California, which made distinctions between resident and non-resident relatives, and excluded non-resident relatives from its exceptions, was declared to be invalid.

In each of the above cases the legislation in question was a matter of state concern, but the "privilege" of the non-resident in each of these cases was a fundamental right of citizenship.

In Eingartner vs. Illinois Steel Co., 94 Wis. 70, and Cafrode vs. Gartner, 79 Mich. 332, the "privilege" in question was the right to sue, and it was held that a non-resident could maintain an action in any case where a resident could maintain such an action. In other words, that the right to sue was a fundamental right of citizenship.

In Black vs. Seal, 6 Houst. 541, a state statute which discriminated between a resident and a non-resident in regard to issuing a writ of capias ad respondendum against them, requiring in the former, and not in the latter, an affidavit of fraud previously filed, was declared to be invalid.

In Caldwell vs. Armour, 1 Pennewill (Del.) 545, a state statute which provided that a summons in an action might be served on a non-resident doing business in the state by branch establishment or agency, by leaving a copy thereof with the agent or at the usual place of business of the non-resident, was declared to be invalid. The matter in dispute in that case was the question of the validity of the service of process, an essential requisite of the notice of the hearing that a defendant is entitled to as of right before a valid judgment can be pronounced against him; is a matter of substance and not of form.

In re Opinion Supreme Court, 25 N. H. 537, a state statute which provided that no action of any kind

should be maintained, either in whole or in part, for intoxicating liquors sold in any other state or country, was declared to be invalid as it assumed to deprive the citizens of other states of rights of action to redress injuries to property.

Decisions grounded on unjust discriminations against non-residents are common. State statutes have been declared invalid which imposed on every employer of foreign born unnaturalized male persons over the age of 21 years a tax of 3 cents a day (Frazer vs. Co., 82 Fed. 257); which allowed the residents only to deduct their debts from their personal tax returns (Sprague vs. Fletcher, 69 Vt. 69); which required a non-resident to take out and pay for a license to trade in goods, where no license was required of a resident trader (Ward vs. Maryland, 12 Wall. 418); which discriminated between residents and non-residents in the price to be paid for licenses to sell and put up lightning rods (State vs. Wiggin, 64 N. H. 508), and which pronounced void all contracts made by non-residents of the state who peddled without a license (Rush vs. Holliway, 20 Repr. (Ky.) 9).

In People vs. City of Detroit, 70 Mich. 534, a statute which denied to liquor sellers the right to become surety on the bond required by the statute, was declared to be invalid, as abridging the privileges and immunities of the citizen.

If the privilege of signing another man's bond is a fundamental right of citizenship, surely the right of a man

to name his executor, and the right of such executor to execute such trust and get paid for so doing, is a fundamental right of citizenship.

If there could be any doubt that the right of George Manley to nominate and appoint an executor was a fundamental right of citizenship, and inhered in his right to take, hold and enjoy real estate in the State of Kansas, such doubt is dispelled by the cases of Shirk vs. City of Lafayette, 52 Fed. 857; Farmers' Loan and Trust Co. vs. Ry. Co., 27 Fed. 146; Bryant vs. Richardson, 126 Ind. 145, and Roby vs. Smith, 131 Ind 342, where it was held that a statute of Indiana which provided that it should be unlawful for any person to appoint a non-resident a "trustee in a deed, mortgage or other instrument in writing, except wills, for any purpose whatever," was invalid.

In Farmers' Loan & Trust Co. vs. Ry. Co., supra, at page 149, Judge Gresham said:

"The right is asserted to deny to persons, associations, or corporations, within or without the state, power to convey to any person in trust, not a resident of Indiana, real or personal property within the state. This is a plain discrimination against the residents of other states. If Indiana may disqualify a resident of another state from acting as a trustee in a trust deed or mortgage which conveys a real or personal property as security for a debt due to himself alone, or for debts due himself and other creditors, it would seem that the state might prohibit citizens of other states from holding proptrty within the state, and to that extent

from doing business within the state. No state can do the latter. A person may, and frequently does, acquire a property interest by a conveyance to him in trust. A citizen of the United States cannot be denied the right to take and hold absolutely real or personal propery in any state in the Union, nor can he be denied the right to accept the conveyance of such property in trust for his sole benefit, or for the benefit of himself and others. This right is incident to national citizenship" (citing Const. U. S., Art. 4, Sec. 2).

Discriminations against a non-resident are not alone found in the express language of a statute, but may result from decisions of the courts of the state (Chicago, B. & Q. R. Co. vs. Chicago, 166 U. S. 226; Nashville, etc., R. Co. vs. Taylor, 86 Fed. 168). To allow a non-resident executor to be attached and the property of the estate sold to pay the judgment in the attachment would, in effect, (1) allow the estate that is being administered upon by such non-resident executor to be sequestered by proceedings in the district court, when, under the law, an estate that is being administered upon by a resident executor cannot be so sequestered, for the probate court would in such case, have "exclusive jurisdiction" in the case of such estate (Keith vs. Guthrie, 59 Ks. 200, 201); (2) it would subject such estate to the costs and expenses of determining, by the proceedings in the district court, the validity and extent of a claim against the estate, when in the case of a resident executor the costs of such a proceeding can in no event be allowed against the estate of the dead man, (Par. 2870 G. S. Ks.,

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1889); (3) it would deprive the dead man of his fundamental right of nominating one of his immediate friends and neighbors as his executor, if the person desired as an executor, happened to be a non-resident of the state where some of the property of the dead man was situate, and (4) it would deprive the non-resident who was nominated as executor of his valuable right to administer on the estate, and get the fees for so doing.

In the first case named the discrimination would not only be against non-resident executors, but it would also be against residents of the state where the property was situate, allowing an attachment against the property of a resident of the state who had died and who had appointed a non-resident of the state as his executor, and denying such attachment where a resident of the state was appointed an executor. A discrimination resulting solely and entirely by reason of alienage of the executor.

The discriminations are far more glaring than they were in State vs. Duckworth, 51 Pac. Rep. (Idaho) 456, and State of Minnesota vs. Barber, 136 U. S. 313; where under the guise of health laws state statutes made requirements as to inspections, etc., of sheep and dressed meats, which had a tendency to exclude foreign sheep and dressed meats.

If the attachment in this case is sustained, how can it be said that whatever rights the laws of Kansas have given to resident executors, they have also given to non-resident executors, "neither more nor less" (Slaughter House Cases, 16 Wall. 36, 37)?

How can it be said that the non-resident executor, in this case, has been placed "upon the same footing" with a resident executor "so far as the advantage resulting from citizenship" in the State of Kansas is concerned, or has been "relieved from the disabilities of alienage" in the State of Kansas, or has had insured to him "the same freedom possessed by the citizens of those states?"

There is nothing in the contention of the defendant in error that a foreign executor is not a "citizen," and cannot claim the rights of a citizen of New Jersey.

Gallup vs. Schmidt, 183 U. S. 300.

Douglass vs. Stephens, 1 Del. Ch. 465, 473.

Farmers' Loan & Trust Co. vs. Ry. Co., 27 Fed. 146.

Shirk vs. City of Lafayette, 52 Fed. 857.

Roby vs. Smith, 131 Ind. 342.

SIXTH: THE JUDGMENT OF THE DISTRICT COURT OF ATCHISON COUNTY, KANSAS, OF DECEMBER 13, 1897, WAS RENDERED BY THAT COURT IN A CASE WHERE JURISDICTION WAS OBTAINED OVER THE PERSON OF THE PLAINTIFF IN ERROR, BY ATTACHMENT OF THE PROPERTY IN HIS CHARGE, AS EXECUTOR OF THE ESTATE OF A DEAD MAN, AND AS THE ATTACHMENT WAS UNAUTHORIZED, ILLEGAL AND VOID, THE COURT OBTAINED NO JURISDICTION OVER THE PERSON OF THE PLAINTIFF IN ERROR, OR OVER THE PROPERTY IN HIS

CHARGE, AND SUCH JUDGMENT BEING ABSOLUTELY VOID, WAS NOT RES JUDICATA, AND THE PLAINTIFF IN ERROR HAD A RIGHT TO HAVE IT SET ASIDE, AT ANY TIME, BY MOTION.

Jurisdiction over the subject matter cannot be given by consent, and when for any cause a court has no jurisdiction of the subject matter in an action, neither the appearance and consent by the parties, nor pleading to the merits and going to trial, will give the court jurisdiction.

12 Am. & Eng. Enc. L. (1st Ed.), p. 301, n. 2.

12 Am. & Eng. Enc. L. (1st Ed.), p. 303, n. 1.

Want of jurisdiction may be taken advantage of at any time in the trial court, even after judgment has been entered. The want of jurisdiction in the trial court may be enquired into in the appellate court.

12 Am. & Eng. Enc. L. (1st Ed.), pp. 306-307, par. 12, cit.,

Foreman vs. Carter, 9 Ks. 674.

A court may be asked to determine its own jurisdiction in four different ways.

1. Motion to dismiss the suit for want of jurisdiction may be made at any time. A motion to dismiss may also be made in an appellate court for want of jurisdiction in the lower court.

2. A demurrer on the ground of want of jurisdiction may be taken when the want of jurisdiction is apparent in the face of the record.

3. A plea, in abatement of the action, to the jurisdic-

tion of the court, may be entered when the want of jurisdiction is not apparent on the face of the record.

4. A motion to vacate the judgment.

12 Am. & Eng. Enc. L. (1st Ed.), p. 309.

An appellate tribunal may be asked to determine whether the lower court had jurisdiction in the case, or having jurisdiction, had properly used it by,

1. A writ of certiorari.

2. A writ of prohibition. This is the only remedy by which the lower court can be restrained from attempting to exercise a jurisdiction which it does not have.

12 Am. & Eng. Enc. L. (1st Ed.), pp. 310-311.

"A judgment entered by a court without jurisdiction is void and will be held such in a collateral proceeding, or on appeal in the same proceeding. When a court transcends its jurisdiction its judgment will also be void."

12 Am. & Eng. Enc. L. (1st Ed.), p. 311, par. 13.

"A judgment of a court having no jurisdiction either of the person or of the subject matter, is a nullity."

Butcher vs. Bank, 2 Ks. 70.

Mastin vs. Gray, 19 Ks. 461.

In any case, jurisdiction of the court over the subject matter, is the power of the court to render the judgment that it does render.

In Rose vs. Himely, 4 Cranch. 241, the controversy was over a cargo, which, after being shipped from a port of Santo Domingo, in possession of the brigands, was captured by a French privateer, and carried to Barracoa, a small

port on the island of Cuba, where it was sold by the captor. The cargo having been brought by the purchaser into the State of South Carolina, was libeled in the court of admiralty, by the original American owner. The purchaser defended his title by a sentence of condemnation procured by a tribunal sitting in Santo Domingo, after the property had been libeled in the court of this country, and by an order of sale made in pursuance of said judgment. It was contended that the court pronouncing the sentence, of necessity, decided in favor of its jurisdiction, and if its decision was erroneous, the error should be corrected by the superior tribunals of its own country, not by those of a foreign country. In answering this contention Chief Justice Marshall, who delivered the opinion of the court, said:

"This proposition certainly cannot be admitted to its full extent. A sentence professing on its face to be the sentence of a judicial tribunal, if rendered by a self-constituted body, or by a body not empowered by its government to take cognizance of the subject it had decided, could have no legal effect whatever.

"The power of the court then is, of necessity, examinable to a certain extent by that tribunal which is compelled to decide whether its sentence has changed the right of property. The power, under which it acts, must be looked into, and its authority to decide questions which it professes to decide, must be considered.

"But although the general power by which a court takes jurisdiction of causes must be inspected, in order to

determine whether it may rightfully do what it professes to do, it is still a question of serious difficulty, whether the situation of the particular thing on which the sentence has passed may be inquired into for the purpose of deciding whether that thing was in a state which subjected it to the jurisdiction of the court passing the sentence. For example: in every case of foreign sentence condemning a vessel as a prize of war, the authority of a tribunal to act as a prize court must be examinable. Is the question whether the vessel condemned was in a situation to subject her to the jurisdiction of the court also examinable? This question, in the opinion of the court, must be answered in the affirmative.

"Upon principle, it would seem that the very operation of every judgment must depend on the powers of the court to render that judgment; or in other words, on its jurisdiction over the subject matter which it has determined. In some cases that jurisdiction unquestionably depends as well as on the state of the thing, as on the constitution of the court. If, by any means whatever, a prize court should be induced to condemn, as prize of war, a vessel which was never captured, it could not be contended that this condemnation operated a change of property. Upon principle, then, it would seem that, to a certain extent, the capacity of the court to act upon the thing condemned, arising from its being within or without their jurisdiction, as well as the constitution of the court, may be considered

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by that tribunal which is to decide on the effect of the sentence."

This case was followed in Scott vs. McNeal, 154 U. S. 34.

Want of jurisdiction may be shown either as to the subject matter or the person, or, in proceedings in rem, as to the thing, and a record contrary to the fact as to any of these matters is not res adjudicata, but may be impeached collaterally.

In Thompson vs. Whitman, 18 Wall. 457, it was held that where, by a law of New Jersey, non-residents were prohibited from raking clams and oysters in the waters of that state, under penalty of forfeiture of the vessel employed; and any two justices of the county in which the seizure of the vessel was made, were authorized, on information given, to hear and determine the case, if the seizure was not made in the county where the prosecution took place, the justices of that county had no jurisdiction, and that this fact might be inquired into, in an action for making such seizure brought in New York, notwithstanding the record of a conviction was produced which stated that the seizure was made within such county; that want of jurisdiction may be shown either as to the subject matter or the person, or, in proceedings in rem, as to the thing

In In re Sawyer, 124 U. S. 200, 221, it was held that an injunction issued by the Circuit Court of the United States, for the District of Nebraska, restraining the city authorities of Lincoln, Nebraska, from proceeding to re-

move a police judge from office, was void, and could be disregarded with impunity. And on page 493, the court said:

"The case can not be distinguished in principle from that of a judgment of the common bench in England, in a criminal prosecution, which is coram non judice; or the case of a sentence passed by the circuit court of the United States upon a charge of an infamous crime, without a presentment or indictment by a grand jury."

S. P. State vs. Milligan, 3 Wash. St. 144.

In United States vs. Walker, 109 U. S. 258, it was held that a justice of the Supreme Court of the District of Columbia had no authority, under section 976 R. S. Dist. Col., to pass an order directing an administrator, who has been removed, to pay over to his successor the proceeds of a debt due the decedent, which he had collected, as such property are not assets or estate of the decedent; and as such an order was not within the jurisdiction of the court it was void and not conclusive in an action on the administrator's bond to recover the money so collected.

In that case the court (p. 265) said:

"The next point taken by the plaintiff in error, that the decree of the justice of the Supreme Court of the district directing the administratrix to pay over the fund to her successor, was conclusive in this suit, we are of the opinion that, in making the order referred to, the Supreme Court of the district exceeded its jurisdiction, and that its order is for that reason void. Its authority, and its sole authority

for making the order, is to be found in section 976, above referred to, of the revised statutes relating to the District of Columbia: 'The court shall have further power to order and require assets or estate of the decedent, which may remain unadministered, to be delivered to the newly-appointed administrator de bonis non.' It appears from the pleadings in the case that the money ordered to be paid was the proceeds of a debt due the decedent which his administratrix had collected. It was not, therefore, as we have seen, assets or estate of the decedent. It was the property of the removed administrator. The court was therefore without power to direct the payment of the money to the administrator de bonis non. Although a court may have jurisdiction over the parties and the subject matter, yet is it makes a decree which is not within the powers granted to it by the law of its organization its decree is void. The limitation was well expressed by Mr. Justice Swayne in Cornett vs. Williams, 20 Wall. 226, when he said: 'The jurisdiction having attached in this case, everything done within the power of that jurisdiction when collaterally questioned, is held conclusive of the rights of the parties unless impeached for fraud.'

"The case of Bigelow vs. Forest, 9 Wall. 339, is in point. It was an action of ejectment. Bigelow, who was defendant in the court below, relied for title on a sale made under a decree of the United States District Court rendered in a proceeding for the confiscation of the premises sued for under the act of July 17, 1862. Referring to this de-

cree, Mr. Justice Strong, speaking for this court, said: 'Doubtless a decree of a court having jurisdiction to make the decree cannot be collaterally impeached, but under the act of congress the district court had no power to order a sale which should confer on the purchaser rights outlasting the life of French Forrest.' And the judgment of the court was, that so much of the decree of the district court as was in excess of its powers was void.

"In Ex parte Lange, 18 Wall. 163, Mr. Justice Miller, delivering the opinion of the court, after stating that the circuit court had exceeded its authority in pronouncing sentence upon Lange, and its judgment was therefore void, said:

"'It is no answer to this to say that the court had jurisdiction of the person of the prisoner and of the offense under the statute. It by no means follows that these two facts make valid, however erroneous it may be, any judgment the court may render in such case.'

"In the case of Windson vs. McVeigh, 93 U. S. 274, Mr. Justice Field, after a review of the cases bearing upon this subject, announces their result as follows:

"'The doctrine invoked by counsel, that when a court has once acquired jurisdiction it has a right to decide every question which arises in the case, and its judgment, however erroneous, cannot be collaterally assailed, is undoubtedly correct as a general proposition, but is subject to many qualifications in its application. It is only correct when the court proceeds, after acquiring jurisdiction of the

cause, according to established modes governing the class to which the case belongs, and does not transcend in the extent or character of its judgment the law which is applicable to it.'

"In this case the statute gave the court power, on the removal of an executor or administrator, to order the assets of the decedent, which might remain unadministered, to be delivered to the administrator de donis non. The court made an order directing the delivery of the proceeds of the administered assets. This was beyond the power conferred by the statute, and not within the jurisdiction of the court. The order was therefore void."

In Noble vs. Union River Logging Co., 147 U. S. 165, it was held that the secretary of the interior has no authority to amend the action of his predecessor in office approving the location of a railroad right of way over public lands under the act of March 3, 1875, on the ground that such approval was obtained by misrepresentation and fraud, and that the railroad was not used as a common carrier for hire, but merely to carry property belonging to its owners, for the existence of the railroad with the duties of a common carrier was a quasi jurisdictional fact, which the prior secretary had authority to determine, and his action therein was not subject to collateral attack.

And the court, speaking by Justice Brown, said:

"The position of the defendants in this connection is that the existence of a railroad, with the duties and liabilities of a common carrier of freight and passengers, was a

jurisdictional fact, without which the secretary has no power to act, and that in this case he was imposed upon by the fraudulent representations of the plaintiff, and that it was competent for his successor to revoke the approval thus obtained; in other words, that the proceedings were a nullity, and his want of jurisdiction to approve the map may be set up as a defense to this suit.

"It is true, that in every proceeding of a judicial nature, there are one or more facts which are strictly jurisdictional, the existence of which is necessary to the validity of the proceedings and without which the act of the court is a mere nullity; such, for example, as the service process within the state upon the defendant in a common law action (citing cases); the seizure and possession of the res within the bailiwick in a proceeding in rem (citing cases); a publication in strict accordance with the statute, where the property of an absent defendant is sought to be charged (citing cases). So, if the court appoint an administrator of the estate of a living person, or in a case where there is an executor capable of acting (citing cases), or condemns as lawful prize a vessel that was never captured (Rose vs. Himely, 4 Cranch, 241, 269), or a court martial proceeds and sentences a person not in the military or naval service (Wise vs. Withers, 3 Cranch, 331), or the land department issues a patent for land which has already been reserved, or granted to another person, the act is not voidable merely, but void. In these and similar cases the action of the court or officer fails for want of jurisdiction over the person or sub-

ject matter. The proceeding is a nullity, and its invalidity may be shown in a collateral proceeding.

"There is, however, another class of facts which are termed 'quasi jurisdictional,' which are of necessity to be alleged and proved, in order to get the machinery of the law in motion, but which, when properly alleged and established to the satisfaction of the court, cannot be attacked collaterally. With respect to these facts the finding of the court is as conclusively presumed to be correct as its finding with respect to any other matter in issue between the parties. Examples of these are the allegations and proof of the requisite diversity of citizenship, or the amount in controversy in a federal court, which, when found by such court, cannot be questioned collaterally (citing cases); the existence and amount of the debt of a petitioning debtor in an involuntary bankruptcy (citing cases); the fact that there is insufficient personal property to pay the debts of a decedent when application is made to sell his real estate (citing cases); the fact that one of the heirs of an estate had reached his majority, when the act provided that the estate should not be sold if all the heirs were minors (Thompson vs. Tolmine, 2 Pet. 157); and others of a kindred nature where the want of jurisdiction does not go to the subject matter or the parties, but to a preliminary fact necessary to be proven to authorize the court to act (citing cases). In this class of cases, if the allegation be properly made, and the jurisdiction be found by the court, such finding is conclusive and binding in every collateral proceeding; and,

even if the court be imposed upon by false testimony, its finding can only be impeached in a proceeding instituted directly for that purpose.

"This distinction has been taken in a large number of cases in this court, in which the validity of land patents has been attacked collaterally, and it has always been held that the existence of lands subject to be patented was the only necessary prerequisite to a valid patent. In the one class of cases it is held that, if the land attempted to be patented had been reserved, or was at the time no part of the public domain, the land department had no jurisdiction over it, and no power or authority to dispose of it. In such cases its action in certifying the land under the railroad grant, or in issuing a patent, is not merely irregular, but absolutely void, and may be shown to be so in any collateral proceeding (citing cases).

"Upon the other hand, if the patent be for lands which the land department had authority to convey, but it was imposed upon, or was induced by false representations to issue a patent, the finding of the department upon such facts cannot be collaterally impeached, and the patent can only be avoided by proceedings taken for that purpose."

See also,

Rogers vs. Clemmans, 26 Ks. 522.

Gille vs. Emmons, 58 Ks. 118.

Love vs. Blauw, 61 Ks. 496.

There is no difference between a void judgment and a void act of the legislature, both are nullities—mere pieces

of waste paper, and neither can be the basis of any valid claim.

A judgment rendered upon an unconstitutional law, and based entirely on such invalid act, is void, and can be collaterally attacked.

In Reed vs. Wright, 2 Greene, (Ia.), 15, it was held that an act of the legislature of the Territory of Wisconsin, entitled "an act for the partition of the half-breed land and for other purposes," approved January 16, 1838, and an act supplementary thereto, approved June 22, 1838, and also an act passed by the Iowa legislature, approved January 25, 1839, to repeal both of said acts, were repugnant to the ordinance of 1787, for the government of the people of the United States northwest of the Ohio river, and also to the organic laws of Wisconsin and Iowa, and were therefore void, and that judgments rendered by virtue of said laws were also void.

The case was an action of ejectment, called an action of right, to determine the title to certain land embraced in the reservation of lands for the use of the half-breeds of the Sac and Fox tribes of Indians, and lying between the Mississippi and Des Moines rivers. The legislature acts of Wisconsin and Iowa were based on the assumption that it was expedient in order to the settlement of the half-breed tract, that the title thereto should be investigated and partition and sale of the lands made.

Edward Johnson, David Brigham and Thomas S. Wilson, were appointed as commissioners under the Wisconsin

act to examine the titles, with power to administer oaths, etc., and for that purpose were clothed with as full and ample power as was possessed by the district court. The Iowa act, although it repealed the Wisconsin act, yet provided the manner in which the commissioners, who were appointed under the act, should proceed to collect the amount due them for services rendered in ascertaining the titles to the half-breed lands.

The lands in controversy were sold to pay the amounts so found to be due David Brigham and Edward Johnson, and were purchased by Reed, the plaintiff in error.

The contention in that case was identical with our contention in this case.

On page 19 the court said:

"By the counsel for the defendant in error, it was contended that the Wisconsin and Iowa acts were unconstitutional, and, consequently, all proceedings under them absolutely void. While, upon the other hand, the unconstitutionality of the acts was not only denied, but it was claimed, even if they were not constitutional, as the court rendering the judgments possessed general jurisdiction, it necessarily decided in favor of its jurisdiction, and if that was error, the party could have been relieved in an appellate court, upon writ of error; and that the propriety of the judgments could not be collaterally questioned."

The court held that the question was not res adjudicata; that a party is not obliged to sue out a writ of error to reverse a void judgment; he may wait until the judgment is

attempted to be enforced on proceedings under it, and then attack it collaterally; but with erroneous judgments it is different; if he sleeps upon his rights, his remedy is lost (p. 33).

That the line which separates error in judgment from the usurpation of power is very definite, and is precisely that which denotes the case where a judgment or decree is reversible only by an appellate court, or may be declared a nullity collaterally, when it is offered in evidence in an action concerning the matter adjudicated, or purporting to have been so. In the one case it is a record purporting absolute verity, in the other mere waste paper (p. 35, citing Voorhees vs. Bank, 10 Pet., 449).

That when a court has jurisdiction it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But if it acts without authority, its judgments and orders are regarded as nullities; they are not voidable, but simply void, and form no bar to a remedy sought even prior to a reversal, in opposition to them. They constitute no justification, and all persons concerned in executing such judgments or sentences are considered in law trespassers. The distinction runs through all cases on the subject, and it proves that the jurisdiction of any court exercising authority over a subject, may be enquired into in every court where the proceedings of the former are relied on and

brought before the latter, claiming the benefit of said proceeding (p. 37, citing Elliott vs. Piersoll, 1 Pet., 340).

In Webster vs. Reed, 1 How. 437, the controversy was over the same proceedings as in Reed vs. Wright, 2 Greene (Ia.), 15, and the same result was arrived at, reversing Webster vs. Reed, 1 Morris (Ia.), 632, cited by defendant in error (Brief p. 23).

In Horan vs. Wahrenberger, 9 Tex. 313 (58 Am. Dec. 145), the controversy was in regard to an execution and sale under a judgment of the Supreme Court of Texas, rendered on an appeal from a judgment of the district court which reversed a judgment of a justice of the peace, in an action between the same parties. The judgment of the Supreme Court reversed the judgment of the District Court and affirmed the justice's judgment.

In its opinion, the court said (Hemphill, C. J.):

"On the principles settled in this case it is very clear that the district court acted without authority in revising the magistrate's judgment upon the merits, and that the judgment of the Supreme Court was equally without authority, for if the district court, or the court a quo, had no power, the appellate court had none (citing cases). And it is equally clear that this judgment without lawful power is a nullity, and cannot be used as evidence in support of the title set up by the appellant.

"The principle that a judgment of a court acting without authority is null seems to be of universal application. The only difference in its effect on the judgments of gen-

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eral and of special limited jurisdiction is, that in support of the former, jurisdiction is presumed, while in the latter it must be shown; but whenever the want of power is made to appear, its legal effect is the same, whatever may be the character of the jurisdiction."

And again:

"Another position assumed by the appellant is that it is no objection to his title that the law by which appeal was had from the justice's court, and final judgment in this court, was unconstitutional—or, in other words, that where a law, though unconstitutional, gives jurisdiction, the judgment is not a nullity. In support of this view, the case of Webster vs. Reid, 1 Morris (Ia.), 466, is cited. This case was revised on error in the Supreme Court of the United States (11 How. 437), and the judgment of the lower court was totally reversed. The judgments which had been supported by the lower court were by the Supreme Court declared nullities; and it was also held that when a judgment was brought collaterally before the court as evidence, it may be shown to be void on its face, for want of notice to the person against whom it is recovered, or for fraud."

In Arnold vs. Shields, 5 Dana 18 (30 Am. Dec. 669), it was held that a judgment of a justice court for a penalty in a sum within its jurisdiction, imposed by an unconstitutional statute, is not void, but merely erroneous, and may be corrected by an appeal to the circuit court; in such a case the magistrate has a right to adjudicate and decide

whether the statute under which such penalty is claimed is valid or void.

And the court at page 674 said:

"But if he had no jurisdiction, his judgment was not merely erroneous—it was void, and a ministerial officer might have been guilty of trespass in attempting to enforce it, by execution. Is the judgment void? A judgment, however erroneous, is not void merely because it was ordered on a void claim. It can never be void when the court which rendered it had jurisdiction over the suit brought to obtain it, and a right to decide whether the demand be legal and enforceable or not."

In Hickey vs. Stewart, 3 How. 750, it appeared that by the treaty of 1795 between the United States and Spain, Spain admitted that she had no title to land north of the thirty-first degree of latitude, and her previous grants of lands so situated were of course void. The country thus belonging to Georgia, was ceded to the United States in 1802, with a reservation that all persons who were actual settlers on October 27, 1795, should have their grants confirmed. Congress provided a board of commissioners to examine these grants and declared that their decision should be final. And it was held that the court of chancery of the State of Mississippi had no authornty to establish one of these grants which had not been brought within the provisions of the act of congress. The claim itself being utterly void, and no power having been conferred by congress on that court to take or exercise jurisdiction over

it, for purpose of imparting to it legality, the exercise of jurisdiction was a mere usurpation of judicial power, and the whole proceeding of the court void. And further held that a defendant in ejectment could not protect himself by setting up the record in such a suit, by which the plaintiff in ejectment had been ordered to convey all his title to the defendants in the ejectment, but in consequence of the party being beyond the jurisdiction of the court, no such conveyance had been made, even although the court of chancery, in following up its decree, had legally issued a habere facias possessionem, and put the defendant in ejectment in possession of the land, (equivalent to a judgment in ejectment, followed by like possession (p. 759).

See also:

Mastin vs. Gray, 19 Ks. 458.

Perry, Admr., vs. R. Co., 29 Ks. 420.

Amsbough vs. Exchange Bank, 33 Ks. 105.

Rogers vs. Clemmons, 26 Ks. 522.

Gille vs. Emmons, 58 Ks. 118.

In Seamster xs. Blackstock, 83 Va. 232, it was held that where a widow brought suit in the county court for the sole purpose of having dower assigned to her in her deceased husband's lands; the heirs at law who were infants, being made defendants, and the court not only directed an assignment of dower, but sua sponte, decreed a sale of the residue of the land belonging to the heirs, the decree of sale was void, and might be collaterally attacked for the reason that where the interest of each heir exceeded in value $300,

the county court could not, under Code Va., 1860, p. 581, Sec. 3, decree a sale of the lands in partition.

And further held that the fact that one of the heirs filed a petition in the case subsequently to the decree, alleging errors in the proceedings and attacking the validity of the decree and sale, and the court dismissed the petition, did not render the matter res adjudicata, or prevent the heir from afterwards attacking the decree collaterally.

And the court, in its opinion, said:

"Even if the decree of sale had been consistent with the averments and prayer of the bill, and in other respects regular, yet the decree would have been void, since the statute as it then was, prohibited the county court from decreeing a sale of land for partition when the interest of any party exceeded in value the sum of three hundred dollars, Code, 1860, p. 581, Sec. 3. And here the record affirmatively shows that the interest of each party exceeded in value that sum."

And on the question of res adjudicata the court said:

"In the present case it is unnecessary to express an opinion as to the effect of such a decree; for clearly, the decree of the circuit court, dismissing the petition, can have no greater force or effect than if it had been made by the county court before the removal of the cause to the circuit court; and we take it to be indisputable that no order or decree by a court can be clothed with vitality unless the court has jurisdiction to render it; so that, if the sale of the land in controversy was void, as we have shown it was, the

rights of the parties, the defendants in error, were not and could not be affected by the decree dismissing the petition, in which the jurisdiction of the county court to order the sale was denied. In other words, that decree constitutes no bar to the maintenance of the present action."

In Frankel vs. Satterfield, 9 Houst. 201, it was held that the judgment of a domestic court of record of general jurisdiction may be impeached in a collateral proceeding; and, if want of jurisdiction of the subject matter or of the parties, or of the res in an action in rem, be manifest from an inspection of the record, it will be regarded as a nullity, without having been so adjudged by a formal and direct proceeding for its vacation.

That upon the return of nulla bona upon a writ of foreign attachment under the statute of Delaware, the suit is at an end, and the court has no jurisdiction to proceed further. In such case want of jurisdiction is manifest upon an inspection of the record; and for that reason the original judgment is a nullity, either as a judgment in rem or in personam.

That the rule that in a scire facias to revive a judgment no defense can be availed of which existed anterior to the judgment, is not applicable where want of jurisdiction appearing upon the record is urged against the validity of the judgment; it is immaterial whether such want of jurisdiction be urged in the first or in a subsequent scire facias proceeding.

And the court, in its opinion, said:

"In the application of the established rule that the verity of the record and the validity of the judgment of a superior court of general jurisdiction cannot be collaterally impeached, a distinction has been observed between the want of jurisdiction and the irregularity or erroneous exercise thereof. Where it appears by the record itself, that the judgment of such a court has been rendered without jurisdiction either of the subject matter or of the person of the defendant, or in actions purely or quasi in rem of his property, such judgment and the proceedings for its enforcement, may, in collateral proceedings, be disregarded and treated as a nullity (citing and quoting from Galpin vs. Page, 18 Wall. 350; Voorhees vs. Bank., 10 Pet. 475; Pennoyer vs. Neff, 95 U. S. 714).

And again:

"But, however courts may have differed as to whether the record may be collaterally attacked when its asserts or is silent as to jurisdictional facts, it is now established, by the overwhelming weight of authoritive adjucations, that the record of a domestic court of record of general jurisdiction may be impeached and be regarded as a nullity in a collateral proceeding, if want of jurisdiction of the subject matter or of the parties, or of the res, in an action in rem, is manifest from an inspection of the record. To hold a judgment binding when the record disclosed a want of authority over the defendant would be to impeach, rather than sustain, the absolute verity of the record (citing cases).

"Where a judgment of a domestic court of record of general jurisdiction is void for want of jurisdiction apparent upon the record, it is, in legal effect, no judgment. In legal contemplation it has never had lawful existence. By it no rights are divested. From it no rights can be obtained. Being worthless in itself, all proceedings founded upon it are equally worthless. It neither binds nor bars anyone. All acts performed under it, and all claims flowing out of it, are void. It cannot be the basis of an execution or the foundation of a valid title to property purchased at a sale thereunder. No action on the part of the plaintiff, no action of the defendant, can invest it with any of the elements of power or vitality. It is unavailing for any purpose. It can be taken advantage of at any time, and in any court where it is offered as a conclusive adjudication between the parties; for an inspection shows that it is not such because the court had no power, for manifest want of jurisdiction, to make an adjudication. Such a judgment, when collaterally drawn in question, may be disregarded and treated as a nullity, and need not be adjudged to be such by a formal and direct proceeding for its vacation or reversal (citing cases). This doctrine has been recognized repeatedly in actions of trespass, ejectment, debt on judgments, and other collateral proceedings, wherein such judgments have been drawn in question."

And again:

"The default of the defendant to plead to the scire facias, and show the want of jurisdiction apparent of re-

cord against the original judgment, cannot be held to be such an admission to the contrary, or such a waiver, as will cure that fatal infirmity in the judgment at the time of its rendition, for the character and status of said judgment were fixed at that time. If void then, it could have no existence or force thereafter. As was said by the court in Pennoyer vs. Neff, 95 U. S. 714: 'The judgment, if void when rendered, will always remain void * * * * The validity of every judgment depends upon the jurisdiction of the court before it is rendered; not upon what may occur subsequently.' "

In Smith vs. Broderick, 107 Cal. 644, it was held that where a levy and assessment for payment of a claim against the city is invalid, one for payment of a judgment on such claim is also invalid.

The cases cited by the defendant in error are none of them in point, excepting the discredited and overruled case of Webster vs. Reid, 1 Morris (Ia.) 87.

In U. S. vs. Knox Co., 122 U. S. 306, cited by defendant in error (Brief p. 23), it was held that in a proceeding by mandamus to compel the levy by a county court of a tax sufficient to pay a judgment obtained against the county, the return of the respondents to the alternative writ of mandamus which admitted that the judgment of the relator was recovered upon bonds and coupons issued by the county, but alleged that said soupons were not issued in pursuance of law, making them the valid obligation of the county, the return was insufficient in law as the respond-

ents were estopped to deny the validity of the bonds by the judgment in favor of the relator against the county, and that said judgment was none the less conclusive because rendered by default.

The claimed defect in the bonds was that they were issued only by authority of Sec. 13, of the special charter of the railroad, and not under the general law. The bill in equity alleged that they were issued under the general law of the state. The court held that the bonds would have been valid if issued under Sec. 13 of the special charter of the railroad, and that as the bill in equity alleged that they were issued under the general law, and such allegation was a traversible one, the question was concluded by the judgment.

In Northern Pacific Ry. Co. vs. Ellis, 144 U. S. 458, cited by defendant in error (Brief p. 24), in an action in a Wisconsin court to quiet the title to land, the complaint alleged that defendant claimed under a deed from a county, given as an inducement for the location of defendant's railroad. The state supreme court, affirming an order overruling a demurrer to the complaint, decided that a donation of land by a county to a railroad company was void and could not be validated by the legislature, and therefore the deed to defendant was void. The cause being remanded, the trial court refused to receive in evidence the record of a suit in the United States Circuit Court, commenced subsequently to the one in the state court, by the defendant against plaintiff and others, in which a decree was rendered,

subsequent to the decision of the state Supreme Court, holding the title of the railroad company good. The state Supreme Court held this proper, on the ground that its decision on the demurrer as to the title was res adjudicata. Held, that a writ of error to the state Supreme Court would be dismissed, the judgment resting on a ground not involving a federal question and not denying to the decree of the United States Circuit Court the effect which, under similar circumstances, would be given a judgment of the state court.

In Board vs. Shutter, 139 Ind. 268, cited by defendant in error (Brief p. 23), the controversy was over a proceeding had in a circuit court of Indiana brought by the board of Children's guardians for the appointment of a guardian for an infant. In the proceeding notice was given to the parents, but not to the infant, but the infant was brought into court and was present at the hearing. The court held that the court had the custody of the infant, and as he was present at the hearing, it had jurisdiction of the proceeding, and its order and judgment could not be collaterally attacked.

In Cassell vs. Scott, 17 Ind. 514, the action was brought to restrain the collection of a judgment rendered upon certain bonds, filed with the auditor under the provisions of an unconstitutional law, and it was held that the judgment rendered thereon, although erroneous, was not void, as the judgment "was founded upon the bonds and

not on the act, and of the suit upon them, the circuit court had full jurisdiction" (p. 515 of opinion).

The judgment was not dependent for its validity entirely on the unconstitutional law.

The law of Indiana is clearly shown by the case of Smith vs. Myers, 109 Ind. 1, 9, where the court said:

"It is a rudimentary principle, acted upon again and again, that when it is ascertained that there is no jurisdiction, courts will go no further. It would not only be a vain and fruitless thing to assume to decide a question when there is no jurisdiction, but it would be a mischievous thing, because it would give an appearance of authority to that which is utterly destitute of force. Such a decision would be the merest shadow of authority, binding nobody, (People vs. Walter, 68 N. Y. 403, 411; Weeden vs. Town Council, 9 R. I. 128). It is laid up among the earliest principles of law, that a decision where there is no jurisdiction is absolutely and incurably void."

If we are right in our other contentions, and the Atchison County District Court had no jurisdiction to order the attached property of a dead man sold to pay a simple contract debt of the decedent, then there is no question whatever, under the authorities, that the order and judgment of the court is absolutely void, and creates no estoppel.

Although a court may have jurisdiction over the parties and the subject matter, yet if it makes a decree which is not within the powers granted to it by the laws of its organization, such decree is void and is not res adjudicata.

Bigelow vs. Forest, 9 Wall. 339.

Windsor vs. McVeigh, 93 U. S. 274.

U. S. vs. Walker, 109 U. S. 258.

Ex parte Neilson, 131 U. S. 176.

In the case last cited it was held that if the court which renders a judgment has not jurisdiction to render it, either because the proceedings, or the law under which they are taken, are unconstitutional, or for any other reason, the judgment is void and may be questioned collaterally; and a defendant who is imprisoned under and by virtue of it may be discharged from custody on habeas corpus.

In Folger vs. Ins. Co., 99 Mass. 267, it was held that the dissolution of a corporation at the suit of an individual in the Supreme Court of New York was in excess of the authority of the court, and would be treated as void by the Supreme Judicial Court of Massachusetts.

In Griffith vs. Frazier, 8 Cranch 9, the plaintiff in error, who was also plaintiff in the circuit court, brought an action of trespass to try title to certain lands in South Carolina. His title was derived as follows:

Joseph Salvadore, who was seized of the lands in dispute, died in 1786, and in his last will and testament named several executors, one of whom, Joseph Dacosta, made probate of the will, and was made executor. In 1789, Dacosta left the State of South Carolina and resided in Georgia. In 1790 letters of administration on the goods of Salvadore, unadministered by Dacosta, his qualified executor, were granted to James Lamotte. In August, 1786,

Daniel Bordeaux obtained a judgment against Salvadore. In January, 1791, a thirty-day rule, which by an act of the State of South Carolina was, in certain cases, substituted in the place of a scire facias, was issued to revive that judgment against Lamotte as administrator of Salvadore, and on March 15, 1791, the court entered an order making the rule absolute, and on April 16, 1791, a fieri facias was issued. The land was sold under an execution issued on such judgment, and was conveyed by the sheriff to Peter Freneau by a deed dated June 6, 1791. On July 16, 1796, a decree was rendered in the suit of Pierce Butler vs. Daniel Bordeaux and Peter Freneau, directing the said Peter to convey to such person as Pierce Butler should appoint, and in consequence thereof Peter Freneau conveyed to Samuel Jackson, under whom the plaintiff claimed by mesne conveyances.

The court held, in an opinion delivered by Chief Justice Marshall, that so long as a qualified executor was capable of exercising the authority with which he had been invested by the testator, that authority could not be enforced, either with or without limitation, by the court of ordinary, or any other person, and if, during such capability of the executor, the ordinary grant administration, either absolute or temporary, to another person, that grant was absolutely void. That the court of ordinary would be without jurisdiction, and its act would be void, and to give jurisdiction to the ordinary, a case in which, by law, letters of administration may issue, must be brought before him. That the fact that

the judgment against Salvadore was revived by the circuit court against Lamotte, the administrator, did not make the matter res adjudicata. (See especially the concluding words of the opinion.)

And in the opinion Chief Justice Marshall said:

"If, under any circumstances, the ordinary could grant administration during the absence of an executor who has made probate of the will and is legally competent to act, then he would have jurisdiction of the subject, and would judge of those circumstances; but if, in no possible state of things, he could grant such administration, it would be difficult to conceive how he can have jurisdiction.

"If we refer to authority, we can find no case and no dictum which admits the jurisdiction of the ordinary, where there is an existing executor capable of acting. In many cases it is stated that an administration granted, where there is such an executor, is void. Toller, in his Law of Executors, page 120, says, 'if there be an executor, and administration be granted before probate and refusal, it shall be void on the will being afterwards proved, although the will were suppressed or its existence were unknown, or it were dubious who was executor, or he was concealed or abroad at the time of granting the administration.' It is also said that 'if granted because the executor has become a bankrupt, or if granted, durante minoritate, when the infant had attained his age of seventeen, until the statute of 38 Geo. III. So, if granted by a bishop where an intestate

had bona notabilia, or by an archbishop of effects in another province.' "

"A judgment pronounced by a tribunal having no authority to determine the matter is necessarily and incurably void and may be shown to be so in any collateral or other proceeding in which it is drawn in question."

1 Freem. Judgm., Sec. 120.

Brown Juris., Sec. 1.

"A void judgment is, in legal effect, no judgment. From it no rights can be obtained. Being worthless in itself, all proceedings founded upon it are equally worthless. It neither binds nor bars any one. All acts performed under it, and all claims flowing out of it, are void. The parties attempting to enforce it may be responsible as trespassers. The purchaser at a sale by virtue of its authority finds himself without title and without redress."

Freem. Judgm., Secs. 117, 120.

In Thaxton vs. Smith, 38 S. W. Rep. (7 Tex.), 820, 827, it was held that where a grantor in a trust deed for creditors dies before the trust is executed, and there is a condition of affairs authorizing the appointment of an administrator, the authority of the trustee is terminated, and the district court has no jurisdiction to authorize the trustee to enforce the trust, though no administration is pending, and all the property belonging to the estate is embodied in the trust deed.

And further that the question of jurisdiction was not affected by a prior adjudication in favor of the authority of

the trustee to act under the deed, in an action between the same parties, after the grantor's death, such adjudication being void.

And in that case the court said:

"If it be conceded that the question heretofore ruled upon was involved in that case, the attempted exercise of jurisdiction by that court over the estate of Crosby after his death, would stand upon no firmer basis than would a judgment in plaintiff's behalf in the case before us. In either instance the court was wanting in jurisdiction to empower a trustee without an interest to proceed to dispose of the estate of a decedent."

In Scott vs. McNeal, 5 Wash. 309, an administrator was appointed for the estate of one Moses H. Scott, on the ground that he had "mysteriously disappeared sometime during the month of March, 1881, and more than seven years ago," Scott was in fact alive. The Supreme Court of Washington held that the probate court acquired jurisdiction, and a sale of the lands of the decedent by the administrator could not be collaterally attacked by Scott, in an action of ejectment brought by him to recover the lands where the title had passed to innocent purchasers who had taken possession and made valuable improvements, (following Rodrigas vs. Institution, 63 N. Y. 460). That case was reversed by this court, Scott vs. McNeal, 154 U. S. 34.

The opinion of the court was delivered by Chief Justice Fuller, and Griffith vs. Frazier, 8 Cranch 9; Rose vs.

Himely, 4 Cranch 241, and Thompson vs. Whitman, 18 Wall. 457, were cited and followed.

The reason for the opinion was that the probate court had no jurisdiction, as its jurisdiction was only to grant administration for the estate of dead persons, and it had no jurisdiction whatever over the estate of a live person, and its pretended letters of administration were absolutely void.

In Wise vs. Williams, 3 Cranch 331, it was held that a justice of the peace in the District of Columbia was an officer of the government of the United States, and was exempt from military duty, and that the sentence of a court-martial, imposing on him a fine, was no justification in an action of trespass brought against the collector of militia fines.

While it is true that the personal appearance of the plaintiff in error and his filing an answer in the suit against him would ordinarily give a court jurisdiction over his person, yet this general rule is not applicable to a case like the present where jurisdiction is obtained over a defendant by the attachment of his property. In such a case if the attachment fails, the court loses jurisdiction over the person of the defendant.

Central R. Co. vs. Georgia Co., 32 S. C. 319.
Frankel vs. Satterfield, 9 Houst. 201.
Brenner vs. Egly, 23 Ks. 123.
Neal vs. Reynolds, 38 Ks. 432.
Kellogg vs. Hazlett, 2 Ks. App. 525.

SEVENTH: THE ORDER AND JUDGMENT OF THE DISTRICT COURT OF ATCHISON COUNty, KANSAS, OF DECEMBER 13, 1897, DIRECTING THE SALE OF THE ATTACHED PROPERTY, WAS NOT RES JUDICATA, AND SHOULD HAVE BEEN SET ASIDE ON MOTION OF THE PLAINTIFF IN ERROR.

The order and judgment of the Atchison County District Court, that the attached property be sold, is not, under the Kansas practice and decisions, res judicata, as to whether such property was exempt from judicial process, and being so exempt, the motion of the plaintiff in error to set aside that part of the judgment, and the motion to withdraw the execution should have been sustained. Even if such attached property had been sold, and the sale confirmed by the court, the order of the court confirming such sale would not be res judicata.

Koehler vs. Ball, 2 Ks. 161, syl. 6.

White Crow vs. White Wing, 3 Ks. 270, 280.

Benz vs. Hines, 3 Ks. 390, 397.

Treptow vs. Buse, 10 Ks. 170, 180.

Harrison vs. Andrews, 18 Ks. 535, 539.

Watson vs. Jackson, 24 Ks. 442, 443.

Bank vs. Huntoon, 35 Ks. 577, 587.

De Jarnette vs. Verner, 40 Ks. 244, syl. 5.

Havens vs. Pope, 62 Pac. 538; S. C. 10 Ks. App.

In Rullman vs. Hulse, 33 Ks. 671, it was decided that an attachment could only be issued and levied upon "such

property of his (the defendant), as it not exempt from judicial process." That the attachment might be "vacated or discharged upon motion by any person interested in its discharge." The statute authorizing the discharge of attachments does not create any limitation upon the reasons or grounds for the discharge of attachments, or intimate that there is any such limitation. That the attachment ought to be discharged if it appears that "the property attached does not belong to the defendant, or is exempt from judicial process," and (p. 672) that "it has also been held that in a motion to discharge an attachment against a non-resident the defendant may, for the purpose of discharging the attachment, show that the action did not wholly arise within the limits of Kansas as is required in such cases by statute (Stone vs. Boone, 24 Ks. 337)."

For the reasons given we think that the judgment of the Kansas Supreme Court should be reversed, with directions to sustain the motions filed by the plaintiff in error to set aside the judgment of the Atchison County District Court of December 13, 1897, and the order of the court directing the sale of the property attached in said action, and to withdraw the execution issued on said judgment, and for such other orders and relief as the plaintiff in error may be entitled to.

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